THE

ECCLESIASTICAL

LAW.

BY

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"THE OFFICE AND DUTY OF A JUSTICE OF THE PEACE."

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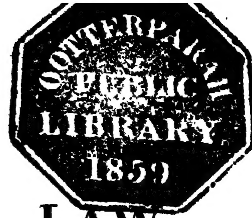
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THE ECCLESIASTICAL LAW.

Vacation.

Who shall have the profits during the vacancy of a benefice.

1. BY the common law of the church, the profits of the vacation were to be laid out for the benefit of the church, or reserved for the successor; but by special privilege or custom, the bishop or archdeacon might have the same, or some part thereof; so also, it is said, the king might take the profits of a free chapel, and the patron of a donative the profits of such donative, during the time of vacation. *Lind.* 137. *Gibs.* 749.

But by the statute of the 28 *H.* 8. *c.* 11. (1) it is enacted as followeth: viz. Forasmuch as in the statute for the payment of first fruits, it is not declared who shall have the fruits, tithes, and other profits of spiritual promotions, offices, benefices, and dignities, during the time of vacation thereof; divers of the archbishops and bishops of this realm have not only when the time of the taking of tithes hath approached, deferred the collection of such benefices as have been of their own patronage, but also have, upon presentations of clerks made unto them by the just patrons, deferred to institute, induct, and admit the same clerks, to the intent that they might receive to their own use the same tithes growing and arising during the vacation: so that through such delays (over and above the first fruits) they have been constrained to lose all or the most part of one year's profits, to their great loss and hinderance: it is therefore enacted, that the tithes, fruits, oblations, obventions, emoluments, commodities, advantages, rents, and all other whatsoever revenues, casualties, and profits, certain and uncertain, belonging to any archdeaconry, deanry, prebend, parsonage, vicarage, hospital, wardenship, provostship, or other spiritual promotion, benefice, dignity, or office, growing or coming during the time of vacation, shall belong *to such person as shall be thereunto next presented, promoted, instituted, inducted, or admitted*, towards the payment of his first fruits.

(1) Intituled "An act for restitution of the first fruits in time of vacation to the next incumbent." Repealed as to § § 7, 8. by 1 & 2 *Phil.* & *Mar.* *c.* 17. repealed 2 & 3 *Phil.* & *Mar.* *c.* 4. but revived 1 *Eliz.* *c.* 4. § § 6. 24.

And if any archbishop, bishop, archdeacon, ordinary, or any other person or persons to their uses and behoof, shall receive or take the same, and shall not upon reasonable request render the same to the next incumbent lawfully instituted, inducted, or admitted, or shall let or interrupt the said incumbent to have the same; he shall forfeit treble value, half to the king and half to the incumbent, to be recovered in any of the king's courts.

[2] *To such person as shall be thereunto next presented, promoted, instituted, inducted, or admitted*] In order to receive the benefit of this clause, it is not absolutely necessary that the clerk be presented by the lawful patron; but if he get institution and induction, though he is afterwards removed by *quare impedit*, he, and not the clerk who comes in upon such removal, shall have the profits of the vacation. And the reason is, because till he is removed, he is incumbent *de facto*, and as such is liable to all burdens and duties, and is therefore in reason and equity intitled to all the profits. 1 *Rol. Rep.* 62. *Gibs.* 749. 4 *Vin. Abr.* 495.

But in cases where the institution and induction are declared by law to be *ipso facto* void (as in case of simony, or the like), there the church having been really never full since the death of the foregoing incumbent, and by consequence the vacancy still continuing, there the profits of course shall pass to him who shall be next presented, instituted, and inducted. *Gibs.* 749.

But though the church doth become void by the omission of some subsequent duty to be performed, yet having been full by institution and induction, and the person thereby liable to the payment of first fruits, he shall not lose the profits of the vacation; only the profits from the time of such avoidance *ipso facto* will go to the next incumbent, as profits of the vacation, which commenceth from thence. *Gibs.* 749.

Inducted or admitted] This cannot be understood disjunctively, as if presentation or admission (without institution and induction) intitled the successor to the profits of the vacation; but admission here (coming after induction) was plainly added, to include those preferments which are not taken by institution and induction. And although in preferments which are so taken, institution gives a right to enter upon and take the profits as well of the vacation as others; yet that which alone can give a right to sue for them, is induction. *Gibs.* 749.

Sequestration issued, on benefice becoming void.

2. Anciently upon the death of an incumbent, without any formal sequestration, the rural dean was to take the vacant benefice into his safe custody, and to provide for the necessary cure of souls; and to take care that the glebe land was seasonably tilled and sowed, to the best advantage of the successor, to whom they were to give up the intermediate profits, and be allowed their necessary charges, which upon dispute were to be moderated by the bishop or his official. But the canon lawyers in

process of time deprived the country deans of this, as well as of all other parts of jurisdiction; and the chancellors of bishops, or their archdeacons, laid claim to the custody of vacant churches, and by forms of sequestration assigned them over to the œconomi or lay guardians of the church. *Ken. Par. Ant.* 647.

For now, the ordinary way of managing the profits of vacation is by sequestration granted to the churchwardens. Upon consideration of which, Dr. Watson and Dr. Gibson take occasion to wish, that some of the neighbouring clergymen might be appointed, and would take upon them the trouble of that office, in inspecting and managing the profits, and of supplying or providing for the cure; and that the ordinary, in granting patents, would not convey to chancellors, commissaries, or officials, the right of granting these sequestrations, in times of vacation, but would reserve it to their own immediate cognisance; since it is a point in which the interest of the church and clergy, and also the immediate care of souls for the time, are so nearly concerned. *Gibs.* 749.

3. The churchwardens, having taken out a sequestration under the seal of the office, are to manage all the profits and expences of the benefice for the successor; to plough and sow the glebe, gather in tithes, thresh out and sell corn, repair houses, make up his fences, pay his tenths, synodals, and procurations; and what other things are necessary during the vacation. Management of the profits.

But the sequestrators cannot maintain an action for tithes in their own name, at common law, nor in any of the king's temporal courts; but only in the spiritual court, or before the justices of the peace in such cases as the law impowers them to hear and determine. *Johns.* 122.

Thus in the case of *Berwick* and *Swanton, T.* 1692; it was resolved, that a sequestrator cannot bring a bill alone for tithes; because he is but as a bailiff, and accountable to the bishop, and has no interest. *Bunb.* 192.

4. By the statute of 28 *H.* 8. *c.* 11. It shall be lawful to every archbishop, bishop, archdeacon, and ordinary, their officers and ministers, to retain in their custody so much of the profits of the vacation, as shall be sufficient to pay unto such person as shall serve the cure his reasonable stipend or salary. § 5. Supply of the cure.

And if the fruits of the vacation be not sufficient to pay the curate's stipend and wages for serving the cure the vacation time; the same shall be borne, and paid by the next incumbent, within fourteen days next after he hath the possession of his living. § 10.

And it may be safest for the churchwardens, to get it stated by the ordinary, when they take out the sequestration, what they are to pay to the curate weekly for the serving of the cure:

and then there can be no contention about it when they make up their accounts. *Par. L. c.* 29.

And Dr. *Gibson* says, such curate ought to be duly licensed by the ordinary, for serving of the cure; otherwise if he proceeds without such licence, he can have no title to any stipend or salary; nor can any be legally reserved and deducted for him. *Gibs.* 750.

Successor when to enter.

5. The successor's right to enter commenceth immediately upon his induction, but his right to the profits commenceth from the avoidance of the benefice. But where the benefice is in lease, and there is a year or more to come in the term; the lessee may hold and enjoy the lease to the end of the year wherein he is entered at the time of the death of the last incumbent; paying to the successor all such rent and services as for the remnant of the said year shall upon such lease be due, and the successor may recover the same in like manner as his predecessor might have done. [28 *H.* 8. *c.* 11. § 8.] (*a*) Provided, that every successor [after the death of his predecessor] may have, upon one month's warning after his induction, the mansion-house with the glebe belonging to the same (not being sown at the time of his predecessor's death), for maintenance of his household; deducting for the same in his rent as heretofore hath been paid for the same, or as it is reasonably worth. § 9. *Swinb.* 107.

Sequestrators to account.

6. As soon as a new incumbent is instituted and inducted, the sequestrators are to account to him for all the profits of the benefice, which they have received during the vacancy. *Wats. c.* 30.

In which account they may deduct their reasonable expences, for collecting and levying the tithes, fruits, emoluments, rents, and other profits rising and growing during the vacation. 28 *H.* 8. *c.* 11. § 5.

If he be dissatisfied with the account, he may bring them to acccunt before the ordinary, by whom all things relating hereunto are properly examinable and to be determined. *Wats. c.* 30.

In the case of *Jones* and *Barret*, *H.* 1724; on a bill by the vicar of West Dean in the county of Sussex against the defendant, who was sequestrator, for an account of the profits received during the vacation; it was objected for the defendant, that the bishop ought to have been made a party, since the sequestrator is accountable to him for what he receives, by the statute of 28 *H.* 8. And the court seemed to think the bishop should have been a party; but by consent the cause was referred to the bishop of the diocese. *Bunb.* 192.

(*a*) And see 9 *Vin. Ab.* 36. But this clause is repealed by the 1 & 2 *Phil. & Mar. c.* 17. as to leases made by parsons, vicars, or any other having any spiritual promotion. Vid. 2 *Vern. Rep.* 136. 204. *Serj. Hill's MSS.*

7. By the 28 *H.* 8. *c.* 11. If an incumbent before his death hath caused any of his glebe lands to be manured and sown at his proper costs and charges with any corn or grain; he may make his testament of all the profits of the corn growing upon the said glebe lands so manured and sown. § 6. Proportioning the profits with the predecessor's executors.

But if his successor is inducted before the severance thereof from the ground, the successor shall have the tithe thereof; for although the executor represents the person of the testator, yet he cannot represent him as parson, inasmuch as another is inducted. 1 *Roll's Abr.* 655.

Otherwise, if the parson dieth after severance from the ground, and before the corn is carried off; in this case, the successor shall have no tithe: because, though it was not set out, yet a right to it was vested in the deceased parson by the severance from the ground. The same is true in case of deprivation, or resignation, after glebe sown: the successor shall have the tithe, if the corn was not severed at the time of his coming in; otherwise if severed. *Gibs.* 662.

In the case where lands are let to farm, it is enacted by the 11 *G.* 2. *c.* 19. as follows: Whereas, where a lessor or landlord, having only an estate for life in the *lands, tenements,* or *hereditaments* demised, happens to die before or on the day on which any rent is reserved, or made payable, such rent or any part thereof is not by law recoverable by the executors or administrators of such lessor or landlord; nor is the person in reversion entitled thereto, any other than for the use and occupation of such *lands, tenements,* or *hereditaments,* from the death of the tenant for life; of which advantage hath been often taken by the under-tenants, who thereby avoid paying any thing for the same: for remedy thereof, *it is enacted,* that where any tenant for life shall die before or on the day on which any rent was reserved or made payable, upon any demise or lease of any lands, tenements, or hereditaments, which determined on the death of such tenant for life, the executors or administrators of such tenant for life, may in an action upon the case recover of the under-tenant, if such tenant for life die on the day on which the same was made payable, the whole, or if before such day, then a proportion of such rent according to the time such tenant for life lived, of the last year, or quarter of a year, or other time in which the said rent was growing due; making all just allowances, or a proportionable part thereof. § 15.

Under which words *lands, tenements,* or *hereditaments,* it hath been holden, that not only *glebe lands* are included, but also *tithes,* for *tithes* are *hereditaments.* (*b*) A lease for a year, if the

(*b*) *Quere* the preamble to this clause, by which it seems that it does not extend to a lease of tithes: and no lease or agreement made

incumbent shall so long live or continue incumbent, is construed to enure for a year, and this statute, it hath been argued, divides the rent, be it for lands or tithes, between the executor and successor, making proportionable allowances for taxes and other outgoings.

Sir *William Blackstone* says, the courts of law have of late years leaned as much as possible against construing leases, where no certain term is mentioned, to be tenancies at will, but have rather held them to be tenancies from year to year so long as both parties please, especially where an annual rent is reserved: in which case, they will not suffer either party to determine the tenancy even at the end of the year, without reasonable notice to the other., 2 *Bla. Com.* 147.

And in the case of *Timmins* and *Rawlinson*, *H.* 5 *G.* 3. it is said by the court, that even a lease at will is a tenancy for a year certain; and it is not material in such case, whether the lease be in writing, or not in writing. 3 *Burr. Rep.* 1609.

On the other hand it is contended, that this act between landlord and tenant had not the case of tithes in contemplation. Unto which purpose is applicable the opinion of a very great man, the late bishop *Hoadly*, who, in a letter to his son upon this subject, expresseth himself thus: " The clause in the act of " 11 *G.* 2. can only extend to such leases, as tenants for life had " power by law to make before the said act; the act creating no " new power, but remedying an inconvenience arising in the " exercise of an old power. This proves, that it cannot affect " those leases, which common incumbents of parishes often " make to their tithe-holders, fixing days of payment generally " half-yearly. Such leases, though expiring with their makers, " yet are not touched by this act, nor can they deprive a successor of any of the tithes which fall after the death of the predecessor, by virtue of this clause, which gives the lessor's " executors a right to the proportion of rent to the day of his " death; because these leases are not (properly speaking) leases, " nor of force against the successor, and do not give the under-tenant any such advantage, as this clause was meant to prevent. For the clause was designed to prevent the cunning of " dishonest under-tenants, who took a handle from such leases " to pay neither the executors of the lessor nor his successor; " which cannot affect the case of a successor in a living, who
[7] " has a right to all the tithes from the death of his predecessor " without this act, as the executors of the predecessors have to " all in his time. And as to the under-tenant, if he has paid

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by a parson, unless confirmed by a patron or ordinary, and made with legal requisites, can bind the successor; so that a lease or agreement cannot alter the case as to tithes. *Serj. Hill's MSS.*

"the predecessor any of those which belonged to the successor, "it is to his own loss; which ought to be made up by the pre-"decessor's executors, and may by law be required. This "clause therefore had no relation to the common leases of in-"cumbents of parishes at all." —— His lordship adds, "These "observations convinced no less a lawyer than Mr. Baron "Clarke, who mistaking the act had given his opinion to the "archbishop of York to the contrary."

In an anonymous case, about three years after making this act, reported by *Bunbury, M.* 1730. In the exchequer: A rector agreed with his parishioners for tithes, for a certain sum payable yearly at Michaelmas. The rector died about a month before Michaelmas. The agreement determining by the death of the parson, the successor shall be entitled to tithes in kind only from the death, and the executor of the last incumbent to a proportion according to the agreement till the time of the testator's death. And this is by an equitable construction. *Bunb.* 294.

With respect to those tithes which are not in lease, there can be no doubt but that the executor shall be entitled to those that became due before the incumbent's death, and that the successor shall be entitled to those that became due after the incumbent's death.

And here a case frequently happeneth, with respect to moduses in lieu of tithes; which tithes, if taken in kind, would have been due before the death of the incumbent, and the modus for the same is not due till after the death of the incumbent. Which case not coming in any sense within the purview of the said statute, it seemeth that the executors are not entitled to the said modus, or to any part thereof; but that the whole shall go to the successor.

There is another case, wherein it may be disputed, at what time the modus itself shall be said to be due. As, for instance, it is usual in many places to ascertain the modus at Martinmas, by then taking an account of the stock for the year preceding; and not to receive the modus till Easter following. In which case if it shall appear from the evidence, as from payment thereof sometimes made at the time when ascertained, or in the intermediate space betwixt that time and the more usual and ordinary days of payment, or from receipts given and accepted for the [8
same as due at the time when ascertained, or the like, and that the payment thereof was only deferred for convenience, when the incumbent should receive his other dues, or for other like cause; in such case it will be due to the executor: But if it shall appear, that the same hath been understood as not due until such future day, and only advanced sometimes before such day to answer the incumbent's necessities or other convenience, then it seemeth

that it will go to the successor. So that this is a matter not of law, but of fact; and depends upon the evidence.

As to disputes concerning things fixed to the freehold, as hangings, tapestry, grates, glasses, furnaces, and such like; these, falling in with the general doctrine about what shall belong to heirs or successors, on the one hand, and executors or administrators on the other, are treated of under the title Wills.

Vacation of bishoprics. See Bishops.

Vestry.

Vestry, what.

1. A VESTRY, properly speaking, is the assembly of the whole parish met together in some convenient place, for the dispatch of the affairs and business of the parish; and this meeting being commonly held in the vestry adjoining to, or belonging to the church, it thence takes the name of vestry, as the place itself doth, from the priest's vestments, which are usually deposited and kept there. *Par. L. c.* 17. [Where a disturbance took place at a meeting of the parishioners convened for the consideration of parish matters, and assembled in the parish church, it was held that the ecclesiastical court had jurisdiction *ratione loci. Wilson* v. *M'Math*, 3 *B. & A.* 241. But where the vestry is held in a vestry *room*, that court will not interfere further than may be necessary for preserving due order and decorum. *Hutchins* v. *Denziloe*, 1 *Hagg. Rep.* 184, 5.]

[*Power of spiritual court over vestry.*]

Notice of the meeting.

2. On the Sunday before a vestry is to meet, public notice ought to be given, either in the church after divine service is ended, or else at the church door as the parishioners come out; both of the calling of the said meeting, and also the time and place of the assembling of it; and it will be fairest then also to declare for what business the said meeting is to be held, that none may be surprised, but that all may have full time before to consider of what is to be proposed at the said meeting. *Wats. c.* 39. *Par. L. c.* 17. (1) [And see now 58 *G.* 3. *c.* 69. §1. *infra.*]

[9]

And it is usual that for half an hour before it begins, one of the church bells be tolled, to give the parishioners notice of their assembling together. *Par. L. c.* 17.

[Who may vote.

3. Anciently, at the common law, every parishioner who paid to the church rates, or scot and lot, and no other person, had

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(1) Proclamation during divine service for the *meeting* of a vestry, or of *the purport* of such meeting, is convenient and proper, but of the *result* the contrary. *Thompson* v. *Tapp, MSS. Cas.* 17. See Public worship.

a right to come to these meetings: But this must not be understood of the minister; who hath a special duty incumbent on him in this matter, and must be responsible to the bishop for his care herein: and therefore in every parish meeting, he *presides* for the regulating and directing this affair; and this equally holds, whether he be rector or vicar. *Par. L. c.* 17. [See note (2) to 58 *G.* 3. *c.* 69. § 1. *infra*, and *id.* § 3.]

Also out-dwellers, occupying land in the parish, have a vote in the vestry, as well as the inhabitants. *Johns.* 19.

4. *E.* 11 *G. Phillybrown* and *Ryland.* The plaintiff brought a special action upon the case, for excluding him from the vestry-room; and upon demurrer, the court made no difficulty, but that such an action was maintainable: however, in this case, they gave judgment for the defendant, it not being averred that the parish had any property in this room, or right to meet there; so that for ought appears it might be the defendant's own house, and then he might let in whom he pleased, and refuse the rest. *Str.* 624. **Hindering persons from the meeting.**

5. And when they are met, the major part present will bind the whole parish. *Wats. c.* 39. **Majority conclusive.**

6. *T.* 9 *G.* 2. *Stoughton* and *Reynolds.* Adjudged, that the right of adjourning the vestry, is not in the minister or any other person as chairman, nor in the churchwardens, but in the whole *assembly, where all are upon an equal footing; and the same must be decided (as others matters there) by a majority of votes. Str.* 1045. (2) **Power of adjourning.**

7. And to prevent disputes, it may be convenient, that every vestry act be entered in the parish book of accounts; and that *every man's hand consenting to it, be set thereto. Par. L.* 54. [See 58 *G.* 3. *c.* 69. § 2. *infra.*] **Entry of acts made.**

8. The vestry clerk is chosen by the vestry; and he acts as register or secretary thereto, but hath no vote: and his business is, to attend at all parish meetings, and to draw up and copy all orders and other acts of the vestry, and to give out copies thereof when necessary: and therefore he hath the custody of all books and papers relating thereto. *Par. L. c.* 18. (*a*) **Clerk.**

9. The beadle (in the Saxon *bydel*, from *beodan*, to bid) is **Beadle.**

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(2) *Cas. temp. Hardw.* 274. *Fortesc.* 168. *S. C. Gibs.* 1476.

(*a*) But his office is not such for which *mandamus* will lie, though perhaps the vestry clerk may have that writ to compel those who have the custody of the parish books, to deliver them to him. *The King* v. *the Churchwardens of Croydon*, 5 *Term Rep.* 713.

[The court refused to compel a vestry clerk to produce documents in the parish chest in his custody, it being in effect to furnish evidence against himself in an action of libel brought by plaintiff against him: otherwise, if they had been wanted for the purpose of advancing any parochial right. *May* v. *Gwynne*, 4 *B.* & *A.* 301.]

chosen also by the vestry; and his business is to attend the vestry, to give notice to the parishioners when and where it is to meet, and to execute its orders as their messenger or servant. *Par. L. c.* 17.

Select vestry. 10. Select vestries seem to have grown from the practice of chusing a certain number of persons yearly, to manage the concerns of the parish for that year; which by degrees came to be a fixed method, and the parishioners lost not only their right to concur in the public management as oft as they would attend, but also (in most places, if not in all) the right of electing the managers. And such a custom, of the government of parishes by a select number, hath been adjudged a good custom; in that the churchwardens accounting to them was adjudged a good account. *Gibs.* 219.

In some parishes, these select vestries having been thought oppressive and injurious; great struggles have been made to set aside and demolish them. *Par. L. c.* 17.

And no wonder that it hath been so, in such parishes where by custom they have obtained the power to chuse one another; for it is not to be supposed, but that if they are guilty of evil practices, they will chuse such persons as they think will connive at or concur with them therein.

M. 2 *W. Batt* and others against *Watkinson.* In a prohibition prayed to the spiritual court at York, the suggestion set forth, that the parish of *Masham* in *Yorkshire* was an ancient parish, and that time out of mind there were twenty-four of the chief parishioners, who all along had been called the four and twenty; and that during time immemorial, as often as any one of the said four and twenty parishioners happened to die, the rest surviving of the four and twenty did chuse, and during all the same time used to chuse, one other fit and able parishioner of the same parish, to be one of the four and twenty in the room of him so deceased; and that within the said parish there is, and during time immemorial there always hath been a custom, that the said four and twenty for the time being have been used and accustomed as often as there was occasion to make rates, and to assess reasonable sums of money, upon the parishioners and inhabitants in the said parish for the time being for the repairs of the church;
[11] and that the churchwardens of the said parish, during all the time aforesaid, have used to receive all duties and dues for burials in the body or iles of the said church; and if any of the inhabitants refused to pay the said rates or dues for burials as aforesaid, then the churchwardens by warrant from the twenty-four for the time being, were used to distrain the goods and chattels of the said parishioners in the said parish; and that the said twenty-four, with the consent of the vicar or curate, have used to repair the body and iles of the said church; and that

the churchwardens for the time being, during all the time aforesaid, have always used to give up their accounts to the said four and twenty, who allowed or disallowed the said accounts as they saw expedient; and that on the allowance of such account, the churchwardens have always been discharged from giving any other account in any other place; that the Plaintiffs were churchwardens for the year 1680; and after this year was ended, they gave in their accounts to the four and twenty; and that though all pleas concerning prescriptions and customs ought to be determined by the common law, yet the defendant hath drawn and cited them into the spiritual court to give in and pass their said accounts there; and although the said plaintiffs have pleaded all the matters aforesaid in the said spiritual court, yet the said defendant hath refused to admit or to receive the said plea. Upon great debate of this case at several times, the court was of opinion, that the custom was good and reasonable, and a prohibition was granted. *Lutw.* 1027.

So that prescription and constant immemorial usage seems to be the basis and only support of this select vestry. And pursuant hereunto, upon the same foundation, and for the same reasons, was the select vestry of the parish of St. Mary At-Hill in London confirmed and established in the king's bench, not many years ago. And since that time, the select vestries of St. Saviour's and St. Olave's, in Southwark, for want of proof of such prescription and immemorial usage, have been set aside and demolished. *Par. L. c.* 17.

In the act of the 10 *An. c.* 11. for building fifty new churches; the commissioners shall appoint a convenient number of sufficient inhabitants to be vestrymen; and from time to time, upon the death, removal, or other voidance of any such vestryman, the rest or majority of them may chuse another. § 20.

In the several private acts for building particular churches; sometimes the minister, churchwardens, overseers of the poor, [12] and others who have served, or paid fines for being excused from serving those offices; sometimes the minister, churchwardens, overseers of the poor, and all who pay to the poor rate; sometimes, only all who pay such a sum to the poor rate; sometimes, all who rent houses of so much a year; — are appointed to be vestrymen within such parishes, and no other persons.

[By 58 *G.* 3. *c.* 69. intituled 'An act for the regulation of parish vestries,' (extending only to England and Wales; public clause, § 11.; and amended by 59 *G.* 3. *c.* 85.) it *is enacted*, That no vestry or meeting of the inhabitants in vestry of, or for any parish, shall be holden until *public notice shall have been given* of such vestry, and of the place and hour of holding the same, and of the special purpose thereof, three days before the day to

be appointed for holding such vestry by the publication of such notice in the parish church or chapel on some Sunday during or immediately after divine service, and by affixing the same on the principal door of such church or chapel. § 1.

And for the more orderly conduct of vestries, *in case the rector or vicar or perpetual curate shall not be present* (3), the persons so assembled shall forthwith appoint by plurality of votes, to be ascertained as hereinafter directed, one of the inhabitants to be the chairman of and to preside in every such vestry; and in all cases of equality of votes, the chairman shall (in addition to such vote or votes as he may by virtue of this act be entitled to give in right of his assessment) have the casting vote; and minutes of the proceedings and resolutions of every vestry shall be fairly entered in a book, (provided by the churchwardens and overseers,) and shall be signed by the chairman and by such other of the inhabitants present as they shall think proper to sign the same. § 2.

In all such vestries every inhabitant present, who, by the last rate made for the relief of the poor, shall have been assessed in respect of any annual rent, profit, or value, not amounting to 50*l.*, shall give one vote and no more: if assessed for any such annual rent, &c. amounting to 50*l.* or upwards, (whether in one or more than one charge,) shall be entitled to give one vote for every 25*l.* in respect of which he shall have been assessed, so that no inhabitant shall give more than six votes, and where two or more of the inhabitants present shall be jointly rated, each shall vote according to the proportion which shall be borne by him of the joint charge; and where only one of the persons jointly rated shall attend, he shall vote according to the whole of the joint charge. § 3.

When any person shall have become an inhabitant of any parish, or become liable to be rated therein since the making of the last rate, he shall be entitled to vote in respect of the property for which he shall have become liable to be rated, and shall consent to be rated, in like manner as if he should have been actually rated for the same. § 4.

No person who shall neglect to pay any rate for the relief of the poor, which shall be due from and have been demanded of him, (*and*) shall be entitled to vote or to be present in any vestry until he has paid the same. § 5.

" Whereas the word " *and* " was inserted by mistake in the 58 *G.* 3. *c.* 69. § 5. *It is enacted*, that no person who shall neglect to pay any rate for the relief of the poor, due from and

(3) The minister of a parish has a right to preside at vestry meetings. *Wilson* v. *M'Math*, 3 *B.* & *A.* 243. and 244. *notis.* 3 *Phill. R.* 87. S. C.

demanded of him, shall vote or be present at any vestry of the parish for which the rate was made till such rate is paid." 59 *G.* 3. *c.* 85. § 3.

By 58 *G.* 3. *c.* 69. § 6. As well the books by this act directed to be provided and kept for the entry of the proceedings of vestries, as all former vestry books, and all rates and assessments, accounts and vouchers of the churchwardens, overseers of the poor, and surveyors of the highways, and other parish officers, and all certificates, orders of courts and of justices, and other parish books, documents, writings, and public papers of every parish (except the registry of marriages, baptisms, and burials; see 52 *G.* 3. *c.* 146. § 5. tit. **Register.**) shall be kept by such person and deposited in such place and manner as the inhabitants in vestry shall direct; and if any person in whose custody the same shall be, shall wilfully or negligently destroy, obliterate, or injure the same, or suffer the same to be destroyed, obliterated, or injured, or shall after reasonable notice and demand neglect to deliver the same to such person, or to deposit the same in such place as shall by the order of any such vestry be directed, he shall on conviction or confession, or on the oath of one witness before two justices of peace upon complaint thereof made, forfeit not exceeding 50*l.* nor less than 40*s.* as such justices shall adjudge; and the same shall be levied by warrant in such manner as poor rates may be levied, and shall be paid to the overseers and applied for the relief of the poor; But nevertheless every person who shall unlawfully retain in his custody, or refuse to deliver to any person authorized to receive the same, or who shall obliterate, destroy, or injure, or suffer to be obliterated, &c. any book, rate, assessment, &c. or paper belonging to any parish, or to the churchwardens, overseers of the poor, or surveyors of the highways thereof, may be proceeded against in any court, civilly or criminally, as if this act had not been made.

All provisions in this act in relation to parishes shall extend to all townships, vills, and places, having separate overseers, and maintaining their poor separately, and all the directions herein in regard to vestries shall be applied to all meetings which may by law be holden of the inhabitants of any parish, township, vill, or place, for any of the purposes in this act expressed; and the notices hereby required to be given of every vestry may in places in which there shall be no parish church or chapel, or where there is not divine service, be given in such manner as notices of the like nature have been there usually given, or as shall be most effectual for communicating the same to the inhabitants. 58 *G.* 3. *c.* 69. § 7.

Nothing in this act shall alter the time of holding any vestry, parish, or town meeting which is by the authority of any act re-

quired to be holden on any certain day, or within any certain time, nor shall any thing in this act affect the powers of any vestry or meeting holden by virtue of any special act of any ancient and special usage or custom, or change or affect the manner of voting in any vestry or meeting so holden. § 8.

Nothing in this act shall extend to any parish within London or the borough of Southwark. § 10. But only to England and Wales. § 11.

By 59 *G.* 3. *c.* 85. § 1. Any person rated for the relief of the poor in respect of any annual rent, profit, or value, arising from any lands, tenements, or hereditaments, situate in any parish in which any vestry is holden under 58 *G.* 3. *c.* 69., although such person shall not reside or be an inhabitant thereof, may be present at such vestry, and be entitled to give so many votes at such vestry in respect of the amount of such rent or value, as by such act any inhabitant of such parish present at such vestry might do if such person were an inhabitant of such parish.

By § 2. In all cases where any corporation or company of such corporation, &c. shall be charged to such rate, either in the name of such corporation or of any officer of such corporation, the clerk, secretary, steward, or other agent duly authorized may be present at any vestry, and such clerk, &c. shall be entitled to give at such vestry such and so many votes in respect of the amount of the rent, &c. of such lands, &c. as by 58 *G.* 3. *c.* 69. any inhabitant assessed to such rate present might.

By § 3. No clerk, secretary, steward, or agent, shall be entitled to be present or to vote at any vestry, unless all rates which have been assessed in respect of the annual rent, &c. in right of which any such clerk, &c. shall claim to be present and vote, which shall be due and which have been demanded before the meeting of such vestry, shall have been paid.

Where feoffees of a charity were directed to do certain acts only in a vestry or meeting of the said feoffees, and of ten of the inhabitants of the parish which should be vestrymen in the said parish, and not feoffees, it was held that the votes were to be taken *per capita*, and not according to the provisions of the Vestry Act (58 G. 3. *c.* 69.) *Atto. Gen.* v. *Wilkinson*, 3 *Brod. & Bing. R.* 266.

As to *select vestries* for relief of the poor, see 59 *G.* 3. *c.* 12. *The King* v. *Woodman.* 4 *B. & A. Rep.* *Burn's Justice*, by *Chetwynd.*]

Vicar.

A VICAR, *vicarius*, is one that hath a spiritual promotion or living under the parson; and is so denominated, as officiating *vice ejus*, in his place or stead. And such a promotion or living is called a *vicarage*; which is a part or portion of the parsonage allotted to the vicar for his maintenance and support.

This part or portion is in some places an annual sum of money certain; but in most places it is a part of the tithes in kind, which most commonly is the small tithes; and in some places he hath a part of the great tithes, and also of the glebe: and such a one is called a vicar endowed.

Thus he that hath the right to the possession of the lesser part is called a vicar; and he that hath the other and greater part of tithes, is called the parson, who in some parishes is a clergyman, and sometimes the minister or incumbent of the same church; but in other places he is a mere layman, and cannot supply the church but by a spiritual vicar: and this so possessed by a layman, is called an *impropriation*, and himself the *impropriator*.

An *appropriation* is properly when such a parsonage (or vicarage or other church preferment) is in the hands or possession of some ecclesiastical person and his successors, and can be made only to a body politic or corporation spiritual, that hath succession, whereby such body becomes perpetual incumbent of the benefice appropriated, and shall for ever enjoy the tithes and other profits, and the cure of souls belonging thereto.

But the words *impropriation* and *appropriation* are generally confounded in the books: and the law concerning the whole is treated of under the title **Appropriation**, and see INDEX, *Vicarage*.

Vicar general. [13]

VICAR general is an officer whose office is usually annexed to that of *Chancellor*, and is therefore treated of under that title. See **Fees**.

Vigil. See **Holidays**.

Vi laica removenda.

VI laica removenda is a writ which (upon the bishop's certificate in chancery of a force and resistance touching a church)

lieth where a debate or controversy is between two parsons for a church, the one whereof doth enter into the church with strong hand and great power of the laity, holding the other out, and keeping possession thereof with force and arms. Whereupon he that is so held out of possession may have the said writ directed to the sheriff of the county, to remove the force within that church, and (if need be) to raise the power of the county to his assistance, and to arrest and imprison the persons that make resistance, so as to have their bodies before the king at a certain day to answer the contempt. Which writ is sometimes grantable without the bishop's certificate as aforesaid; for it may, as it seemeth, be had upon a surmise made thereof by the incumbent himself without such certificate; there being a distinct and several form thereof in each of the said cases. So that this writ properly lieth for the removal of any forcible possession of a church kept by laymen. *God.* 645. *F. N. B.* 124.

By this writ the sheriff ought not to remove the incumbent who is in possession of the church, whether the possession be of right or wrong; but only to remove the force. *F. N. B.* 125.

The writ is made returnable into the king's bench, in which court the offenders shall be fined and punished for the force: and restitution also shall be awarded out of the same court (as it seemeth). *Wats. c.* 30.

Visitation. (1)

NOTE, free chapels and donatives (unless such donative hath received the augmentation of queen Anne's bounty) are
[14] exempt from the visitation of the ordinary; the first being visitable only by commission from the king, and the second by commission from the donor: And there are also other churches and chapels exempted, which did belong to the monasteries; having heretofore obtained exemptions from ordinary visitation, and being visitable only by the pope; which by the statute of 25 *H.* 8. *c.* 31. were made visitable by the king, or by commission under the great seal. These, and other exempted churches or chapels, so far forth as they are exempted, are not treated of under this title; the purport whereof extendeth only to places visitable by the bishop or his subordinate officers.

Origin. 1. For the government of the church, and the correction of offences, visitations of parishes and dioceses were instituted in

(1) See *Com. Dig.* tit. *Visitor.*

the ancient church; that so all possible care might be taken to have good order kept in all places. *God. Append.* 7. (1)

2. For the first six hundred years after Christ, the bishops in their own persons visited all the parishes within their respective dioceses every year; and they had several deacons in every diocese to assist them. After that, they had authority in case of sickness, or other public concerns, to delegate priests or deacons to assist them; and hereupon, as should seem, they cantoned their great dioceses into archdeaconries, and gave the archdeacons commission to visit and inquire, and to give them an account of all at the end of their visitations; and the bishops reserved the third year to themselves, to inform themselves (amongst other things) how the archdeacons, their substitutes, performed their duties. *Deg. p.* 2. *c.* 15. *Johns.* 151.

Who shall visit.

3. By a constitution of *Otho*, archbishops and bishops shall go about their dioceses at fit seasons, correcting and reforming the churches, and consecrating and sowing the word of life in the Lord's field. *Ath.* 56.

How often, and in what order.

And, regularly, the order to be observed therein is this: In a diocesan visitation, the bishop is first to visit his cathedral church; afterwards the diocese: In a metropolitical visitation, the archbishop is first to visit his own church and diocese; then in every diocese to begin with the cathedral church, and proceed thence as he pleaseth to the other parts of the diocese. Which appears from abundance of instances in the ecclesiastical records, as well of papal dispensations for the archbishop to visit without observing the said order, as of episcopal licences for the visitor to begin in other parts of the diocese than in the cathedral [15] church. *Gibs.* 957.

And this sprang from the precept of the canon law, which requires, that the archbishop, willing to visit his province, shall

(1) Visitatorial power in other establishments than ecclesiastical corporations is an appointment of the founder, or by implication of law, and is not of ecclesiastical origin. Spiritual corporations are visited by the ordinary: if he is visitor as ordinary, an appeal lies to his superior from his deprivation; but if as patron, no appeal lies. *Per* lord *Holt*, in *Philips* v. *Bury*, 2 *T. R.* 353. 3 *Salk.* 379. And see 2 *Rol.* 229. A motion for a *mandamus* to a visitor to exercise his power during a vacancy of a stall was not pressed, on lord *Mansfield*'s saying, Whether the bishop can have a jurisdiction to determine whether a successor prebendary, or the other prebendaries, are entitled to the profits of a stall during its vacation, or whether matters of property in cathedrals can be determined otherwise than according to the course of the law of the land, is a great question; and certainly, the dean and chapter must have an opportunity to shew cause against the mandamus being issued to the bishop to exercise such a jurisdiction. *The King* v. *the Bishop of Durham*, 1 *Burr.* 567, 568.

first visit the chapter of his own church, and city, and his own diocese: and after he hath once visited all the dioceses of his province, it shall be lawful for him (having first required the advice of his suffragans, and the same being settled before them, which shall be put in writing that all may know thereof) to visit again; according to the order aforesaid, although his suffragans shall not assent thereunto. And the like form of visiting observed by the archbishops shall be observed also by the bishops in their ordinary visitations. *Gibs.* 957. (2)

By *Can.* 60. For the office of confirmation, it is injoined, that the bishop shall perform that office in his visitation every third year; and if in that year, by reason of some infirmity, he be not able personally to visit, then he shall not omit the same the next year after, as he may conveniently.

Upon which Dr. Gibson observeth, that by the ancient canon law, visitations were to be once a year: but it is to be noted, that those canons were intended of parochial visitations, or a personal repairing to every church; as appears not only from the assignment of procurations (originally in provisions, and afterwards in money) for the reception of the bishop; but also by the indulgence which the law grants in special cases, where every church cannot be conveniently repaired to, of calling together the clergy and laity from several parts unto one convenient place, that the visitation of them may not be postponed. From this indulgence, and the great extent of the dioceses, grew the custom of citing clergy and people to attend visitations at particular places; the times of which visitations, as they are now usually fixed about Easter and Michaelmas, have evidently sprung from the two yearly synods of the clergy, which the canons of the church required to be held by every bishop about those two seasons, to consider of the state of the church and religion within the respective dioceses: an end that is also answered by the presentments that are there made concerning the manners of the people; as they used to be made to the bishop at his visitation of every particular church. But as to parochial visitation, or the inspection into the fabrics, mansions, utensils, and
[16] ornaments of the church, that care hath been long devolved upon the archdeacons; who at their first institution in the ancient church were only to attend the bishops at their ordinations, and other public services in the cathedral: but being afterwards occasionally employed by them in the exercise of jurisdiction, not only the work of parochial visitation, but also the holding of ge-

(2) The archbishop of Canterbury never visits the diocese of London, by agreement with the bishop; in consideration whereof, if a cause arises within that diocese, and the suit is brought in the arches before the archbishop, though this is *per saltum*, the bishop is to allow it. 3 *Salk.* 379.

neral synods or visitations when the bishop did not visit, came by degrees to be known and established branches of the archidiaconal office as such; which by this means attained to the dignity of ordinary, instead of delegated jurisdiction. And by these degrees came on the present law and practice of triennial visitations by bishops; so as the bishop is not only not obliged by law to visit annually, but (what is more) is restrained from it. *Gibs.* 958.

Lindwood says, the archdeacon, although there be not a cause, may visit once a year: but if there be cause, he may visit oftener. Nor doth it hinder, where it is said in the canon law, that he ought to visit from three years to three years; for this is to be understood so that he shall visit from three years to three years of necessity, but he may visit every year if he will. *Lind.* 49.

Inhibition during the time of visitation.

4. In the bishop's triennial, as also in visitations regal and metropolitical, all inferior jurisdictions respectively are inhibited from exercising jurisdiction, during such visitation. And we find in the time of archbishop Winchelsey, a bishop prosecuted for exercising jurisdiction before the relaxation of the inhibition; and in archbishop Tillotson's time, a bishop suspended, for acting after the inhibition. And even matters begun in the court of the inferior ordinary (whether contentious or voluntary) before the visitation of the superior, are to be carried on by the authority of such superior. *Gibs.* 958.

However, it hath not been unusual, especially in metropolitical visitations, to indulge the bishops and inferior courts, in whole or in part, in the exercise of jurisdiction, pending the visitation. Thus, we find relaxations granted, pending the visitation by archbishop Abbot; and by others, an unlimited leave or commission to exercise jurisdiction, or proceed in cases, notwithstanding the visitation; and elsewhere, a leave to confirm orders, confirm, grant fiats for institution, institute, or correct, whilst the inhibition continued in other respects. *Id.*

After the relaxation of the inhibition, and especially in metropolitical visitations, we find not only reservations of power to rectify and punish the *comperta et detecta*, but also special commissions issued for that end. *Id.* [17]

Where.

5 *Can.* 125. All chancellors, commissaries, archdeacons, officials, and all others exercising ecclesiastical jurisdiction, shall appoint such meet places for the keeping of their courts, by the assignment or approbation of the bishop of the diocese, as shall be convenient for entertainment of those that are to make their appearance there, and most indifferent for their travel: And likewise they shall keep and end their courts in such convenient time, as every man may return homewards in as due season as may be.

General power of the visitor.

6. *Langton.* The archdeacons in their visitation shall see that the offices of the church be duly administered; and shall take an *account in writing* of all the ornaments and *utensils* of the churches, and also of the vestments and books: which they shall cause to be presented before them *every year* for their inspection, *that they may see* what have been added, or what have been lost. *Lind.* 50.

Account in writing] And it would be well to have the same indented: one part to remain with the archdeacon, and the other with the parishioners. *Lind.* 50.

Utensils] That is, which are fit or necessary for *use:* and by these are understood all the vessels of the church of every kind. *Lind.* 50.

Every year] That is, every year in which they shall visit. *Id.*

That they may see] Therefore the archdeacon ought to go to the place in person to visit, and not to send any other; which if he do, he shall not have the procurations (due upon the account of visiting) in money: but otherwise, he whom he shall send shall receive procurations for himself and his attendants in victuals. *Lind.* 50.

Othob. Concerning archdeacons, we do ordain, that they visit the churches profitably and faithfully; by inquiring of the sacred vessels, and vestments, and how the service is performed, and generally of temporals and spirituals: and what they shall find to want correction, that they correct diligently. And when they visit, correct, or punish crimes, they shall not presume to take any thing of any one (save only moderate procurations), nor to
[18] give sentence against any persons unjustly, whereby to extort money from them. For whereas these and such like things do savour of simony, we decree, that they who do such things shall be compelled by the bishop to lay out twice as much for pious uses; saving nevertheless other canonical punishment against them. And they shall endeavour frequently to be present at the *chapters* in every deanry, and therein instruct the clergy (amongst other things) to live well, and to have a sound knowledge and understanding in performing the divine offices. *Athon.* 52.

Chapters] That is, rural chapters. *Athon.* 54.

Reynolds. We enjoin the archdeacons *and their officials*, that in the visitation of churches they have a diligent regard to the fabric of the church, and especially of the chancel, to see if they want repair; and if they find any defects of that kind, they shall limit a certain time under a penalty within which they shall be repaired. Also, they shall inquire by themselves, or their officials, in the parishes where they visit, if there be aught in things or persons which wanteth to be corrected; and if they shall find any such, they shall correct the same, either then or in the next chapter. *Lind.* 58.

And their officials] Here it seemeth to be intimated, that the archdeacon's official may visit; which yet is not true, at least in his own right; yet he may do this in the right of the archdeacon, when the archdeacon himself is hindered. *Lind.* 53.

Stratford. Forasmuch as archdeacons and other ordinaries in their visitations, finding defects as well in the churches as in the ornaments thereof, and the fences of the churchyard and in the houses of the incumbents, do command them to be repaired under pecuniary penalties; and from those that obey not, do extort the said penalties by censures, wherewith the said defects ought to be repaired, and thereby enrich their own purses to the damage of the poor people: therefore that there may be no occasion of complaint against the archdeacons and other ordinaries and their ministers by reason of such penal exactions, and that it becometh not ecclesiastical persons to gape after or enrich themselves with dishonest and penal acquisitions, we do ordain, that such penalties, so often as they shall be exacted, shall be converted to the use of such repairs, under pain of suspension [19] *ab officio*, which they shall *ipso facto* incur, until they shall effectually assign what was so received to the reparation of the said defects. *Lind.* 224.

Can. 86. Every dean, dean and chapter, archdeacon, and others which have authority to hold ecclesiastical visitations by composition, law, or prescription, shall survey the churches of his or their jurisdiction, once in every three years, in his own person, or cause the same to be done; and shall from time to time within the said three years certify the high commissioners for causes ecclesiastical, every year, of such defects in any the said churches, as he or they do find to remain unrepaired, and the names and surnames of the parties faulty therein. Upon which certificate we desire the said high commissioners will *ex officio mero* send for such parties, and compel them to obey the just and lawful decrees of such ecclesiastical ordinaries making such certificates.

Note, since the making of these canons, the high commission court was abolished by act of parliament. (3)

Visitation sermon.

7. In the year 1626, Mr. Huntley, rector of Stourmouth, was required by Dr. Kinsley, archdeacon of Canterbury, to preach a visitation sermon; which he refused. And being cited before the high commissioners, it was urged, that he was bound to the performance of that office in pursuance of the archdeacon's mandate, by virtue of his oath of canonical obedience. He answered, that he was not a licensed preacher, according to the canons of 1603; and especially, that he was not bound thereunto by his

(3) And never again to be erected. 16 *Car.* 1. *c.* 11. § 3. 1 *W. & M. st.* 2. *c.* 2.

said oath, which implieth only an obedience according to the canon law, as it is in force in this realm; and that there is no canon, foreign or domestic, which requireth him to do this; but on the contrary, that the ancient canon law injoineth the visitor himself to preach at his own visitation. But the court admonished him to comply; and on his refusal, fined him 500*l.* and imprisoned him till he should pay the same, and also make submission; and afterwards degraded and deprived him. *Johns. Huntley's* case.

But this perhaps may be one instance, amongst others, charged against that court whilst it subsisted, of carrying matters with a pretty high hand.

And Dr. Ayliffe observes from the sixth book of the Decretals, that amongst the orders to be observed by archbishops, bishops, [20] and others in their visitations, the first is, that they ought to preach the word of God, by giving the congregation a sermon. *Ayl. Par.* 515.

Nevertheless, it is presumed, very few clergymen would refuse to discharge the offices of their function on the like occasion, at the request or intimation of their superior.

Exhibits. 8. *Can.* 137. Forasmuch as a chief and principal cause and use of visitation is, that the bishop, archdeacon, or other assigned to visit, may get some knowledge of the state, sufficiency, and ability of the clergy, and other persons whom they are to visit: We think it convenient, that every parson, vicar, curate, schoolmaster, or other person licensed whosoever, do at the bishop's first visitation, or at the next visitation after his admission, shew and exhibit unto him his letters of orders, institution, and induction, and all other his dispensations, licences, or faculties whatsoever, *to be by the said bishop* either *allowed*, or (if there be just cause) disallowed and rejected; and being by him approved, to be (as the custom is) signed by the register: And that the *whole fees* accustomed to be paid in the visitations in respect of the premises, be paid only once in the whole time of every bishop, *and afterwards but half of the said accustomed fees*, in every other visitation, during the said bishop's continuance.

To be by the said bishop allowed] None but the bishop, or other person exercising ecclesiastical authority by commission from him, hath right *de jure communi* to require these exhibits of the clergy; nor doth the enacting part of this canon convey the right to any other; and therefore, if any archdeacons are intitled to require exhibits, in their visitations, it must be upon the foot of custom; the beginning whereof hath probably been an incroachment; since it is not likely, that any bishop should give to the archdeacon and his official a power of allowing or disallowing such instruments as have been granted by himself or his predecessors. *Gibs.* 959.

Whole fees] In the registry of archbishop Islip, there is a sequestration of the benefices of divers clergymen refusing to make due exhibits in a visitation. *Gibs.* 1545.

And afterwards but half of the said accustomed fees] Lindwood, speaking of the letters of orders to be exhibited by stipendiary curates going from one diocese to another, saith that after the archdeacon or his official or other ordinary hath satisfied himself of their orders and of their life and conversation, they may be admitted to officiate, and their names ought to be entered in the [21] register of such ordinary; whereupon in other visitations or inquiries their letters of orders ought not to be re-inspected, nor their names to be entered again, seeing they are sufficiently known already: And so they do ill (he says) who in every of their visitations take something for the inspection and approbation of the said letters of orders; seeing such entry ought not to be made but once, namely, at the first admission. *Lind.* 225. *Gibs.* 959.

Presentments, by whom to be made.

9. *Edm.* There shall be *in every deanry* two or three men, having God before their eyes, who shall, at the command of the archbishop or his official, present unto them the *public excesses* of prelates and other clerks. *Lind.* 277.

In every deanry] That is, in every rural deanry. *Lind.* 277.

Public excesses] That is, notorious, whereof there is great and public infamy; and this, although the same be not upon oath: but if such excesses shall not be notorious, then the same shall not be presented, unless there be proof upon oath. *Lind.* 277.

As to the churchwardens' duty in this particular, although they have for many hundred years been a body corporate, to take care of the goods, repairs, and ornaments of the church, as appears by the ancient register of Writs; yet this work of presenting hath been devolved on them and their assistants, by canons and constitutions of a more modern date. Anciently, the way was, to select a certain number at the discretion of the ordinary to give information upon oath; which number the rule of the canon law upon this head evidently supposeth to have been selected while the synod was sitting, and the people as well as clergy in attendance there. But in process of time this method was changed; and it was directed in the citation, that four, six, or eight, according to the proportion of the district, should appear (together with the clergy) to represent the people, and to be the *testes synodales*. *Gibs.* 960. (*a*)

But all this while we find nothing of churchwardens presenting, but the style of the books is, *The parishioners say*, *The laymen say*, and the like, until a little before the Reformation,

(*a*) See Churchwardens, 8.

when the churchwardens began to present, either by themselves, or else with two or three more parishioners of credit joined with them. And this last (by the way) is evidently the original of that office, which our canons do call the office of sidemen or assistants. *Gibs.* 960.

In the beginning of the reign of king James the first, a commissary had cited many persons of several parishes to appear before him at his visitation; and because they appeared not, they were excommunicated. But a prohibition was granted; because the ordinary hath not power to cite any into that court, except the churchwardens and sidemen. [To these be may give his articles, and inquire by them.] *Noy*, 123.

But by *Can.* 113. Because it often cometh to pass, that churchwardens, sidemen, questmen, and such other persons of the laity as are to take care for the suppressing of sin and wickedness, as much as in them lieth, by admonition, reprehension, and denunciation to their ordinaries, do forbear to discharge their duties therein, either through fear of their superiors, or through negligence, more than were fit, the licentiousness of these times considered; we do ordain, that hereafter every parson and vicar, or in the lawful absence of any parson and vicar, then their curates and substitutes, may join in every presentment with the said churchwardens, sidemen, and the rest above mentioned, at the times of visitation, if they the said churchwardens and the rest will present such enormities as are apparent in the parish: or if they will not, then every such parson and vicar, or in their absence as aforesaid their curates, may themselves present to their ordinaries at such times, and when else they think it meet, all such crimes as they have in charge or otherwise, as by them (being the persons that should have the chief care for the suppressing of sin and impiety in their parishes) shall be thought to require due reformation. Provided always, that if any man confess his secret and hidden sins to the minister, for the unburdening of his conscience, and to receive spiritual consolation and ease of mind from him, we do not any way bind the said minister by this our constitution, but do straitly charge and admonish him, that he do not at any time reveal and make known to any person whatsoever, any crime or offence so committed to his trust and secrecy (except they be such crimes as by the laws of this realm his own life may be called in question for concealing the same) under pain of irregularity.

And by *Can.* 116. It shall be lawful for any godly disposed
[23] person, or for any ecclesiastical judge, upon knowledge or notice given unto him or them, of any enormous crime within his jurisdiction, to move the minister, churchwardens, or sidemen, as they tender the glory of God and reformation of sin, to present the same, if they shall find sufficient cause to induce

them thereunto, that it may be in due time punished and reformed.

Provided that for these voluntary presentments there be no fee required or taken.

10. *Boniface.* We do decree, that laymen, when inquiry shall be made by the prelates and judges ecclesiastical for correcting the sins and excesses of those that are within their jurisdiction, shall be compelled (if need be) to take an oath to speak the truth. *Lind.* 109. **To be made upon oath.**

And that ordinaries are impowered by the laws of the church to require an oath of the *testes synodales*, appears, not only from this constitution, but also from the body of the canon law. And the same practice of administering an oath appears in the ecclesiastical records of our own church; where it is often entered, that the presenters were charged upon their consciences, to discover whatever they knew to want amendment in things and persons. *Gibs.* 960.

11. *Can.* 119. For the avoiding of such inconveniences as heretofore have happened, by the hasty making of bills of presentments upon the days of visitation and synods, it is ordered, that always, hereafter, every chancellor, archdeacon, commissary, and official, and every other person having ecclesiastical jurisdiction at the ordinary time when the churchwardens are sworn, and the archbishop and bishops when he or they do summon their visitation, shall deliver or cause to be delivered to the churchwardens, questmen, and sidemen of every parish, or to some of them, such books of articles as they or any of them shall require (for the year following) the said churchwardens, questmen, and sidemen to ground their presentments upon, at such times as they are to exhibit them. In which book shall be contained the form of the oath which must be taken immediately before every such presentment; to the intent that having beforehand time sufficient, not only to peruse and consider what their said oath shall be, but the articles also whereupon they are to ground their presentments, they may *frame them at home* both advisedly and truly, to the discharge of their own consciences (after they are sworn), as becometh honest and godly men. **Articles of inquiry.**

Frame them at home] By an entry in one of our records about 200 years ago, the ancient way of making presentments seems to have been, the ordinary's examination of the synodal witnesses, and the taking their directions and presentments by word of mouth, and then immediately entering them in the acts of the visitation. And although presentments are now required to be framed at home, there is no doubt but every visitor hath the same right of personal examination that ancient visitors had, as often as he shall find occasion. *Gibs.* 963. [24]

By reason of several disputes which have been made concerning

the articles of inquiry, the convocation hath sometimes attempted to frame one general body of articles for visitations; but the same as yet hath not been brought to effect. *Gibs.* 962.

Presentments on common fame.

12. *Can.* 115. Whereas for the reformation of criminous persons and disorders in every parish, the churchwardens, questmen, sidemen, and such other church officers are sworn, and the minister charged to present as well the crimes and disorders committed by the said criminous persons, as also the common fame which is spread abroad of them, whereby they are often maligned and sometimes troubled by the said delinquents or their friends; we do admonish and exhort all judges both ecclesiastical and temporal, as they regard and reverence the fearful judgment-seat of the highest Judge, that they admit not in any of their courts any complaint, plea, suit or suits, against any such churchwardens, questmen, sidemen, or other church officers, for making any such presentments, nor against any minister for any presentments that he shall make: all the said presentments tending to the restraint of shameless impiety, and considering that the rules both of charity and government do presume that they did nothing therein of malice, but for the discharge of their consciences.

But there is more danger now, than when these canons were made, of actions being brought against churchwardens for presenting upon common fame; because the person accused in those days was required to answer upon oath to the charge laid against him, and to bring his compurgators: but the oath *ex officio* being now abolished, it seemeth not safe, to present any person upon common fame only, without proof. (*b*)

[25] And even when the oath of purgation was in force, Mr. Clerke gives a caution, that all, both churchwardens and others, take care, how they accuse or present any person for any crime or fame thereof, unless they can prove either the crime, or that the fame thereof arose from just causes and strong presumptions. Therefore, although the fame or rumour of any crime hath been spread amongst many and good men, yet if it had its beginning from enemies or evil-minded persons, or (as is often the case) from the sole accusation of a woman confessing her own turpitude, the presentment or accusation in such case ought not to be general, but particular; that is, that such a fame or rather rumour was spread by such persons, or by the accusation or confession of such woman in child-birth confessing her own baseness: And then, if the person accused shall proceed against the accuser in a cause of defamation, he shall fail in his suit, if proof shall be made that there was such a fame or rumour as was set forth in the presentment. 1 *Ought.* 236.

(*b*) See Churchwardens, 8. and 17.

13. It is not enough to present that such a one hath committed fornication, or the like; but the person ought to be named with whom he committed the offence, and that there is a public fame thereof; otherwise upon such a general and uncertain presentment, the person accused cannot know how to make his defence, and there may be cause of appeal. 1 *Ought.* 229.

Presentment in what manner to be made.

14. *Can.* 116. No churchwardens, questmen, or sidemen of any parish, shall be inforced to exhibit their presentments to any having ecclesiastical jurisdiction, above once in every year where it hath been no oftener used, nor above twice in every diocese whatsoever, except it be at the bishop's visitation: Provided always, that, as good occasion shall require, it shall be lawful for every minister, churchwardens, and sidemen, to present offenders as oft as they shall think meet; and for these voluntary presentments no fee shall be taken.

At what times to be made.

Can. 117. No churchwardens, questmen, or sidemen, shall be called or cited, but only at the said time or times before limited, to appear before any ecclesiastical judge whosoever, for refusing at other times to present any faults committed in their parishes, and punishable by ecclesiastical laws. Neither shall they or any of them, after their presentments exhibited at any of those times, be any further troubled for the same, except upon manifest and evident proof it may appear that they did then willingly and wittingly omit to present some such public crime or crimes as [26] they knew to be committed, or could not be ignorant that there was then a public fame of them, or unless there be very just cause to call them for the explanation of their former presentments: In which case of wilful omission, their ordinaries shall proceed against them in such sort, as in causes of wilful perjury in a court ecclesiastical it is already provided.

Can. 118. The office of all churchwardens and sidemen shall be reputed to continue, until the new churchwardens that shall succeed them be sworn, which shall be the first week after Easter, or some week following, according to the direction of the ordinary; which time so appointed shall always be one of the two times in every year, when the minister, and churchwardens, and sidemen of every parish, shall exhibit to their several ordinaries the presentments of such enormities as have happened in their parishes since their last presentments. And this duty they shall perform, before the newly chosen churchwardens and sidemen be sworn, and shall not be suffered to pass over the said presentments to those that are newly come into that office, and are by intendment ignorant of such crimes; under pain of those censures which are appointed for the reformation of such dalliers and dispensers with their own consciences and oaths.

15. *Can.* 116. For the presentments of every parish church or chapel, the register of any court where they are to be exhi-

Fee for taking in presentments.

bited shall not receive in one year above 4*d.*; under pain, for every offence therein, of suspension from the execution of his office for the space of a month *toties quoties.*

Penalty for not presenting.

16. Besides being proceeded against by the censures of the church; it is injoined by *Can.* 26. That no minister shall in any wise admit to the receiving of the holy communion, any churchwardens or sidemen, who having taken their oaths to present to their ordinaries all such public offences as they are particularly charged to inquire of in their several parishes, shall (notwithstanding their said oaths, and that their faithful discharge of them is the chief means whereby public sins and offences may be reformed and punished,) wittingly and willingly, desperately and irreligiously, incur the horrible crime of perjury; either in neglecting, or in refusing, to present such of the said enormities and public offences, as they know themselves to be committed in their said parishes, or are notoriously offensive to the congregation there; although they be urged by some of their neighbours, [27] or by their minister, or by the ordinary himself, to discharge their consciences by presenting of them, and not to incur so desperately the said horrible sin of perjury.

H. 1680, *Selby's* case. A prohibition was prayed to the archdeacon of Exeter, because he proceeded to excommunicate the plaintiff, for that he, being churchwarden, refused to present a notorious delinquent, being admonished. And a prohibition was granted: for they are not to direct the churchwarden to present at their pleasure; but if one churchwarden doth refuse to present, he may be presented by his successor. *Freem.* 298.

None to be presented twice for the same offence.

17. *Can.* 121. In places where the bishop and archdeacon do by prescription or composition visit at several times in one and the same year; lest for one and the self-same fault any of his majesty's subjects should be challenged and molested in divers ecclesiastical courts, we do order and appoint, that every archdeacon or his official, within one month after the visitation ended that year, and the presentments received, shall certify under his hand and seal, to the bishop or his chancellor, the names and crimes of all such as are detected and presented in his said visitation, to the end the chancellor shall henceforth forbear to convent any person for any crime or cause so detected or presented to the archdeacon. And the chancellor, within the like time after the bishop's visitation ended and presentments received, shall, under his hand and seal, signify to the archdeacon or his official, the names and crimes of all such persons, which shall be detected or presented unto him in that visitation, to the same intent as aforesaid. And if these officers shall not certify each other as is here prescribed, or after such certificate shall intermeddle with the crimes or persons detected and presented in each other's visitation; then every of them so offending shall

be suspended from all exercise of his jurisdiction, by the bishop of the diocese, until he shall repay the cost and expences which the parties grieved have been at by that vexation.

18. Crimes evident and notorious, whether they be immoralities in persons, as lewdness, swearing, drunkenness, and such like; or defects in places, as the want of repairs; or of utensils in churches, churchyards, and parsonage-houses; are not only in their nature merely spiritual and ecclesiastical, but in the chief heads thereof (as fornication, adultery, and the repairing of churches and churchyards) by the statute of *Circumspecte agatis*, 13 *Ed.* 1., not liable to prohibition: And therefore if offenders being presented, do escape unpunished, it must be owing either to the want of proof, or the want of prosecution. *Gibs.* 966.

Churchwardens to support their presentments.

[28]

As to legal proof; in case the party presented denies the fact to be true, the making good the truth of the presentment, that is, the furnishing the court with all proper evidences of it, undoubtedly rests upon the person presenting. And as the spiritual court in such case is intitled by law to call upon churchwardens to support their presentments; so are churchwardens obliged not only by law (Dr. *Gibson* says) but also in conscience, to see the presentment effectually supported; because to deny the court those evidences which induced them to present upon oath, is to desert their presentment, and is little better, in point of conscience, than not to present at all; inasmuch as through their default the presentment is rendered ineffectual, as to all purposes of removing the scandal, or reforming the offender. And from hence he takes occasion to wish, that the parishioners would think themselves bound (as on many accounts they certainly are bound) to support their churchwardens, in seeing that their presentments are rendered effectual. In any point which concerns the repairs or ornaments of churches, or the providing conveniences of any kind for the service of God, when such defects as these are presented, the spiritual judge, immediately, and of course, injoins the churchwarden presenting, to see the defect made good, and supports him in repaying himself by a legal and reasonable rate upon the parish. But what he intends is, the supporting the churchwardens in the prosecution of such immoral and unchristian livers, as they find themselves obliged by their oath to present, as fornicators, adulterers, common swearers, drunkards, and such like: whose example is of pernicious consequence, and likely to bring many evils upon the parish. *Id.*

19. In all visitations of parochial churches made by bishops and archdeacons, the law hath provided, that the charge thereof shall be answered by the procurations then due and payable by the inferior clergy; wherein custom, as to the quantum, shall prevail. *God. Introd.* 19.

Procurations.

Anciently by provisions in kind.

20. These procurations were anciently made, by *procuring* victuals and other provisions in specie; concerning which the following constitutions have been ordained:

[29] *Langton.* We forbid archdeacons, deans, and their officials, to make any exactions upon their clergy. *Lind.* 221.

Langton. That archdeacons may not be burdensome to the churches subject unto them, we strictly injoin, that they do not exceed the number of horses and men *prescribed by the general council;* and that they do not presume to invite strangers with them to the procuration made for them on account of their visitation. But if the rectors of the churches, in honour of the archdeacon, will invite any, we do not forbid it. But the archdeacons themselves shall invite none, lest they who would not burden the churches by their own coming, should yet burden them by those whom they should invite. And that there may be no occasion to invite any, we do forbid the archdeacons to hold any chapter on the day of visitation at the church which they visit, unless it be in a borough or city. And we injoin the archdeacons, that they do not *in any wise* receive procuration without reasonable cause, but only on the day when they *personally visit* the church; and that they do not extort money from the church as a fee or ransom for not visiting. *Lind.* 219.

Prescribed by the general council] That is to say, five or six: but herein a regard ought to be had to the custom of the country or place. *Lind.* 220.

In any wise] That is, neither in victuals, nor money, nor any thing in lieu thereof. *Id.*

Personally visit] But yet, if through infirmity or any other lawful cause, the archdeacon be hindered from visiting in person, he may exercise the office by another; and in such case the procurations shall be paid. *Id.* 221.

Othob. The archdeacons shall not burden the churches with superfluous expences, but only require moderate procurations when they visit; and shall not bring strangers with them, but demean themselves modestly both in regard to their attendants and their horses. *Athon.* 53.

Othob. The church visited ought in reason to entertain the visitor: but where no visitation is, there shall be no procuration; and if any person shall take any thing, he shall be suspended from the entrance of the church, until he make restitution. And the bishops and other inferior prelates, when they visit, shall not burden the clergy with a superfluous number of attendants or
[30] horses, or otherwise in expences; and if they do, the clergy shall not obey them in that behalf; and any sentences of excommunication, suspension, or interdict, on occasion thereof, shall be void. *Athon.* 114.

Stratford. No procuration shall be due, without actually

visiting: And if any shall visit more churches than one in one day, he shall have but one procuration, to be proportioned amongst the said churches. And because sometimes the retinue of a visitor exceedeth the number of men and horses appointed by the canons, so that they who pay their procurations in victuals are excessively burdened beyond the rate which is usually paid in money; it shall be in the choice of the visited, to pay the same in money or in provisions. *Lind.* 223.

21. And this last constitution, by putting it in the choice of the incumbent, whether he would entertain the visitor in provisions or compound for it by a certain sum of money, was the cause of the custom generally prevailing afterwards, and which now universally obtaineth, of a fixed payment in money, instead of a procuration in meat, drink, provender, and other accommodation. *Gibs. Tracts,* 13. (4) **Now converted into money.**

22. Procuration is due to the person visiting, of common right: and although originally due by reason of visitation only, yet the same may be due without actual visitation. The fore- **Whether due when no visitation is made.**

(4) These proxies are now part of the settled revenue of the bishop's see; the king himself pays them for his appropriations, as the abbeys did before the dissolution when they had appropriated churches. In the great Irish case of Procurations, 2 *Jac.* 1. *The King* v. *Sir Ambrose Forth, Davys's Rep.* 1., it was held, (p. 3.) *First,* That as the service of the tenant in repairing a castle, having been commuted into a money rent, is payable though the castle is demolished (*Sir William Capel's* case, cited 4 *Rep.* 88 *a.*); so for the same reason, though benefices impropriate become a lay fee, and being in lay hands are not visitable, and though religious houses are suppressed, still the ascertained sums given as and retaining the name of procurations, and by ancient composition made parcel of the settled revenues of a bishop, shall remain for ever without being subject to extinguishment. Nor shall their origin be examined or brought into question, more than that of pensions or portions of tithes arising out of many abbeys and impropriate rectories. *Secondly,* (p. 4.) That procurations being in their original nature duties payable for visitation, were grantable to the king as head of the church, who might take the same, specially because the said duties were converted into a sum certain in the nature of a pension; and that being so grantable to the king, a *bishop* might so grant the same, being part of his see. (13 *Eliz.* *c.* 10. § 3. is *contra* in England.) *Thirdly,* (p. 4.) That the unity of possession of procurations with the impropriate rectories by the religious houses out of which the procurations are payable, does not extinguish the latter in the hands of the king, but suspends the payment thereof for the time, till the king by his grant severs one from the other; and this (p. 6.) is assimilated to the case of tithes. For as tithes are due to lay persons who have purchased impropriate rectories, though they give no instruction (which was the origin of tithes); so proxies are due to ordinaries out of the impropriations of the dissolved religious houses, though their visitation has ceased.

going constitutions limit the payment, whether in provisions or money, to actual visitation, and warrant the denial of them when no visitation is held. Upon which a doubt hath been raised, whether those archdeacons who are not permitted to visit, but are inhibited from doing it in the bishop's triennial visitation, have a right to require procurations for that year. They who have maintained the negative, build their opinion upon the express letter both of the ancient canon law, and of our own provincial constitutions. But others, who undertake to defend the rights of the archdeacons, allege, that though it might be reasonable that they lose their procurations, in case they neglect their office of visiting (which, by the way, was all that the ancient constitutions meant), yet that reason doth not hold when they are restrained and inhibited from it; and that procurations are rated in the valuation of king Henry the eighth, as part of the revenues of every archdeacon, who therefore pays a certain annual tenth for them; and the law could never intend the payment of the tenth part every year, if there had been any year in which [31] he was not to receive the nine parts. Which two arguments (Dr. *Gibson* says) are so strong in favour of the archidiaconal rights, the first in reason, and the second in law as well as reason, that no more need to be said upon that head. *Gibs.* 975. [And see *Sir Ambrose Forth*'s case, *Resolution* 3d, in the last note.]

To be sued for in the spiritual court.

23. Procurations are suable only in the spiritual court, and are merely an ecclesiastical duty. *L. Raym.* 450.

And may be levied by sequestration, or other ecclesiastical process. *Gibs.* 1546.

To be paid by rectories impropriate, where there is no vicar endowed.

24. *E.* 7 *G. Saunderson* and *Clagett.* Dr. Clagett, archdeacon of Sudbury, commenced a suit in the consistory court of the bishop of Norwich, against Saunderson, as proprietor or curate of the impropriate rectory of Aspal in Suffolk, for the annual sum of 6*s.* 8*d.* as a procuration or proxy due to the archdeacon for visitations. Saunderson moved the court of king's bench for a prohibition; and suggested that this rectory of Aspal was time out of mind a rectory impropriate, without any vicar endowed; that all the tithes and profits within this rectory time out of mind belonged to the proprietor thereof, who at his own expence used to provide a curate to celebrate divine service at the parish church of Aspal. But it was denied by the whole court, who delivered their opinions *seriatim:* 1. That this was an ecclesiastical duty, and therefore properly suable for in the spiritual court. 2. That it was claimed both by and from an ecclesiastical person, which made it the stronger. 3. That though there was an impropriation in the case, still there must be a curate, to take care of the souls of the parishioners; and that curates as well as other persons must stand in need of bishops' or archdeacons' instructions and visitations. Conse-

quently. 4. That the ordinary or archdeacon ought to be allowed for his procuration, what had been usually paid for it, which here appeared to be 6*s.* 8*d.* 5. That where a thing is claimed by custom in the spiritual court, it must be intended according to their construction of a custom; and by their law forty years make a custom or prescription. 1 *Peere W.* 657. *Str.* 421.

25. If there be a parsonage and a vicarage endowed, only one is to pay procurations; but which of them must pay is to be directed by custom, or the endowment, if extant. *Deg. p.* 2. *c.* 15. Impropriate rectory where there is a vicar endowed.

26. *Stratford.* A chapel of ease shall be included in the procuration of the mother church. *Lind.* 223. *Deg. p.* 2. *c.* 15. Chapel of ease under a parochial church.

27. Churches newly erected shall be rated to procurations, according to the proportion paid by the neighbouring churches. *Gibs.* 976. Churches newly erected.

28. Donatives and free chapels pay no procurations to any ecclesiastical ordinary, because they are not visitable by any. *Deg. p.* 2. *c.* 15. Places exempted.

Places exempted, as to other matters, are treated of under the title Peculiars.

Synodals or *cathedratica*, and *pentecostals*, are treated of under their respective titles.

Visitation of the Sick. See Sick.

Uniformity. See Public worship.

Union.

1. THE union or consolidation of churches ought to be founded upon good canonical reasons. And the principal reasons assigned by the canon law are, for hospitality, nearness of the places, want of inhabitants, poverty or smallness of the living. Which circumstances are specially inquired into before the union, and (some, or all of them, as the case is) are recited in the preamble to the act of union. *Gibs.* 920. Causes of union.

2. And in such case, by the common law of the realm, the ordinaries, patrons, and incumbents may make a consolidation or an union of the two churches into one. 1 *Salk.* 165. (5) *Hughes, c.* 28. Who may unite.

(5) *Harman* v. *Renew.* But the union of parishes was not at

And in such case, it is said, that the consent of the king is not at all necessary, albeit he hath an interest in the churches in the case of lapse. For by the ancient canon law, the licence of the pope was not necessary; nor hath the licence of the king been judged necessary since the reformation, inasmuch as unions have been ordinarily made without such licence; however, in some few instances, it may have been desired and obtained, for the greater caution. *Austyn* v. *Twyne, Cro. Eliz.* 500. (6) *Gibs.* 916. 920. *Wats. c.* 16.

Restraint of union by statute.

3. By the 37 *H.* 8. *c.* 21. An union or consolidation of two churches in one, or of a church and chapel in one, the one of them not being above the yearly value of 6*l.* (*c*) in the

common law. S. C. 3 *Salk.* 89. *Skinn.* 616. S. P. So in the vacancy of the churches they may be united by the ordinary, with assent of the patrons; and it is sufficient if the union is afterwards confirmed by the king. 2 *Rol.* 778. *l.* 45. But in stat. 10 *C.*, for uniting livings in Ireland, it was resolved they could not be united during vacancy. *The King* v. *Archbishop of Armagh, Stra.* 516. It is not material who begins the union, the bishop, patron, or king. 2 *Rol.* 778. *l.* 50. But an union made on false suggestions is void. *Id. l.* 15. *Cro. El.* 501. Nor will simultaneous presentation of churches for two hundred years make an union thereof. *Sav. R.* 17.

(6) 2 *Rol.* 778. *l.* 36. *Bro.* tit. *Appropriation.*

(*c*) [But this act being in the affirmative only, and not in the negative, an union may still be made at common law of churches of greater value than are mentioned in the act 37 *H.* 8. *c.* 21. *Austyn* v. *Twyne, Cro. El.* 500.]

By 21 *H.* 8. *c.* 13. § 9. if any person having one benefice with cure, of the yearly value of 8*l.* or above, take any other with cure, and be inducted in possession of the same, then immediately after such possession the first benefice shall be void. And by § 10. it shall be lawful for the patron to present; any licence, *union*, or other dispensation to the contrary thereof notwithstanding. By which word *union* there is meant not a perpetual, but a temporary union during the life of an incumbent. *Gibs. Cod.* 970. *Art.* 7. And this is there clearly proved, first by the words of the union, and also by the case of *Page* v. *Bp. of London, Cro. El.* 719, 720. For, where the union is perpetual, the two churches are become so much one, that a second benefice may be taken by dispensation within the statute of pluralities. *Gibs. ubi supra.* But, though it was holden in *Digby's* case, 4 *Co.* 78., that institution alone to a second makes a first benefice void, so that no dispensation will operate to make them tenable together; yet *per curiam, Digby's* case extends only to dispensations, and is by no means a general rule. [*Bp. of Lincoln* and *Whitehead* v. *Wolferstan*] 1 *Blackst. Rep.* 494. [*Sed qu. de ceo.* is there added.] *Serj. Hill's MS. Notes.* [And in the case of an union by ecclesiastical law, there is but *one* institution. See *Heath J.* &c. 6 *Taunt.* 51. As to temporary union for the life of the incumbent, see 3 vol. 98.]

king's books, and not distant from the other above one mile, may be made by the assent of the ordinary and ordinaries of the diocese where such churches and chapels stand, and by the assents of the incumbents of them, and of all such as have a just right, title, and interest to the patronages of the same churches and chapels, being then of full age; which unions and consolidations so made, shall be good and available in the law, to continue for ever, in such manner and form, as by writing or writings under the seal of such ordinaries, incumbents, and patrons shall be declared and set forth.

Provided, that where the inhabitants of any such poor parish, or the more part of them, within one year next after the union or consolidation of the same parish, by their writing sufficient in the law, shall assure the incumbent of the said parish for the yearly payment of so much money as, with the sum that the said parish is rated and valued at in the court of first fruits and tenths, shall amount to the full sum of 8*l.*, to be levied and paid yearly by the said inhabitants to the said incumbent and his successors, all such unions or consolidations made of any such poor parish as aforesaid shall be void and of none effect.

In towns corporate.

4. By the same statute it is provided, that all unions and consolidations, to be made of any church or chapel within any city or town corporate, without the assent of the mayor, sheriffs, and commonalty of such city, or without the assent of the body corporate of other towns corporate, by the names of their corporations in writing under their common seal, shall be void.

And by the 17 *C.* 2. *c.* 3. "Forasmuch as the settled provision "for ministers in most cities and towns corporate is not suf-"ficient for the maintenance of able ministers fit for such places, "whereby mean and stipendiary preachers are entertained to "serve the cures there; who wholly depending for their main-"tenance upon the good will and liking of their auditors, have "been and are hereby under temptation of too much complying, "and suiting their doctrine and teaching to the humour rather "than good of their auditors; which hath been a great occasion "of faction and schism, and of the contempt of the ministry:" *it is enacted*, that in every city or town corporate and their liberties, which have a mayor and aldermen, and particular justices of the peace by charter or commission, or bailiff or bailiffs, or other chief officer or officers, and other assistants, by like charter; [34] and where two or more churches or chapels, or a church and a chapel, and the parishes thereunto belonging, do lie within the said corporation or liberties thereof, convenient to be united, in such cases the bishop of the diocese where such parish or parishes are, with the consent of the mayor, aldermen, and justices of the peace, bailiff or bailiffs, or other chief officer or officers, or the major part of them, and of the patron or patrons

of such churches or chapels, shall or may, according to due form of law, unite the said churches or chapels, or any of them, and shall appoint at which of them the parishioners and inhabitants shall usually meet for the worship of God, and which of them shall be united and annexed unto the other, which shall be the church presentative, unto which all presentations shall thereafter be only made, and unto which the parishioners shall resort as their proper church; and after such order made, the said churches or chapels shall accordingly for ever stand united. And the parishioners, landholders, and inhabitants shall, as any of them become void, from thenceforward pay all such tithes and other duties, as did belong to the incumbent of any of the churches or chapels so united and annexed unto the incumbent of the said presentative church or chapel unto which such other shall be so united and annexed as aforesaid. § 1.

But notwithstanding any such union to be made by virtue hereof, each of the parishes so united shall continue distinct as to all rates, taxes, parochial rites, charges, and duties, and all other privileges, liberties, and respects whatsoever, other than what is hereinbefore mentioned and specified; and churchwardens shall be elected and appointed for each parish as they were before such union made. § 2.

And where one or more of the said churches or chapels so united shall be full at the time of making such union, the said union shall take effect for every such church or chapel, upon the first avoidance after such union made. § 3.

And the several patrons shall present by turns to that church only which shall remain and be presentative from time to time, in such order as the said bishop, with the consent of the said mayor, aldermen, and justices of the peace, bailiff or bailiffs, or other chief officer or officers, within such parishes, or the major part of them, and of the patron or patrons of such churches or [35] chapels, shall determine and decree for the preservation of their respective rights therein, respect being therein had to the differences of the values of the yearly maintenance belonging to such churches or chapels, or any of them. § 4.

Saving to the king all the tenths and first fruits of all such churches and chapels so to be united, according to their rates and valuations in the office of first fruits and tenths; and also reserving all procurations and pensions to all persons to whom they are and have been, or shall be due and payable. § 5.

Provided, that no union of parishes or places to be made by virtue of this act, shall commence or be effectual in law until it be registered in the register-book of the bishop of the diocese; which the register is hereby required to do. § 6.

Provided, that no union made by virtue hereof shall be good and effectual, where the settled maintenance belonging to the

parsons, vicars, and incumbents of the church or chapel, or churches or chapels so united, shall exceed the sum of 100*l.* a year, clear and above all charges and reprizes; unless the respective parishioners, or the major part of them, under their hands desire otherwise. § 7.

Provided, that every minister settled as aforesaid incumbent of any church or chapel, or churches and chapels, united according to this act, shall be full and lawful incumbent thereof to all intents and purposes; so as such minister be a graduate in one of the universities of this kingdom. § 8.

And by the 4 *W. c.* 12. Where one of the churches united by virtue of the said last-mentioned act was at the time of such union, or shall afterwards be demolished, in such case, as often as the church which is made the church presentative, and to which the union was made, shall be out of repair, or there shall be need of decent ornaments for the performance of divine service therein, the parishioners of the parish whose church shall then be down or demolished, shall bear and pay towards the charges of such repairs and decent ornaments, such share and proportion as the archbishop or bishop that shall make such union shall by the same union direct and appoint; and for want of such direction and appointment, then one-third part of such charges of the repairs and decent ornaments which shall be made or provided; and the same shall be rated, taxed, and levied, and in default thereof such process and proceedings shall be made, as if it were for the reparation and finding decent ornaments for their own parish church, if no such union had been made. § 2. [36]

But if both churches are standing, then the repairs and ornaments shall be provided for as they were at the common law; that is, by the parishioners of each parish respectively. *Gibs.* 919.

Union may be in futuro.

5. Unions *in futuro*, as well as *in præsenti*, are good. And therefore if two churches are full, and one is duly united to the other *in futuro*, when either shall become void; the surviving incumbent may enter upon the void living without any other title than that which he received from the act of union. *Gibs.* 920.

Presentation to united benefices.

6. By the union of two churches, no change is made in the advowsons: That is, not only all rights are reserved to the patron or patrons, as before, but the nature of the advowsons continues the same; as if one be appendant, and the other in gross, and that which is appendant is made the presentative church, and the patron of the church in gross hath the first turn, yet shall not the whole advowson be in gross, but it shall remain appendant for his turn who was patron of the advowson appendant, and in gross for his turn who was patron of the advowson in gross. Which being so, (that is, the advowsons, not only as to

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the right, but even as to the nature of them, remaining the same as before,) it seems to be an unreasonable doubt, whether bishops and other ecclesiastical persons can consent to an union by the statutes of the 1 *Eliz.* and 13 *Eliz.* *Gibs.* 920. *Wats.* c. 16.

Reparations. 7. Two churches parochial being united at the common law, the reparations shall remain several as before. Which was the reason why the aforesaid act of the 4 *W.* was found necessary, to make it otherwise in the churches that had been or should be united in virtue of the statute of the 17 *Car.* 2. For before that, the inhabitants, even of a demolished church, were not obliged to contribute to the reparations of the church remaining, to which they were united. *Gibs.* 921.

Other payments and duties. 8. The payment of first fruits and tenths, as before, are specially reserved in the aforesaid statutes: and the same, together with all other payments and duties to the bishop, archdeacon, and the like, and even the fees of institution, are reserved of course in perpetual unions, whether within the said statutes or not. *Gibs.* 917.

Effect of union as to pluralities. 9. By the union, the two churches are become so much one, that a second benefice may be taken by dispensation within the statute of pluralities. *Cro. Eliz.* 720. (*d*) *Gibs.* 920.

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Church united to a prebend. 10. If a church parochial be united to a prebend in a cathedral church, and a clerk is collated to the prebend, and after installed in the cathedral, although that the parish church be not in the same diocese with the cathedral, yet the clerk thereby hath possession thereof, without any presentation, institution, or induction; because, by the union, the parish church is become the corps of the prebend. *Wats.* c. 16.

Union, how tried. 11. After a union is made, if any question doth arise concerning the validity thereof, this may not be tried in the temporal, but only in the spiritual court; unless it be such union, as is restrained by the aforesaid statutes. *Wats.* c. 16.

(*d*) *Page* v. *Bp. of London.* Where three parish churches had been united by 22 *Car.* 2. *c.* 11. it was held that the benefice may be described in pleading, as one rectory. *Wilson,* q. t. v. *Van Mildart,* 2 *B.* & *P.* 394. *Dy.* 259. *b.* [When two churches are united by act of parliament, after the next avoidance of both, the patron cannot present to the united vicarage upon the next avoidance of one. *Harding* v. *Bp. of Winton,* C. P. *M.* 18 *G.* 3. 2 *Bla. R.* 1162. But the union may direct that one church shall be extinct. See *ib.* *Crooke*'s case, 1 *Show. R.* 203. Union does not extinguish the tithes or a *modus.* 8 *Salk.* 165. The impropriator of a rectory who names the curate to a church, shall be the patron after the union of the church with another parish. *Bp. of London* v. *Mercer's Company,* *Stra.* 925. In which case the whole effect of the union of *parishes,* after the fire of London, is discussed; and see also 3 *Lev.* 96. 2 *Jon.* 160. *Skinn.* 616.]

[By 53 *Geo.* 3. *c.* 123. § 26. In cases in which one living has been united to another, and the lands of one such living sold to redeem the land-tax on both, such sales shall be confirmed; and all such sales hereafter to be made for such purpose shall be as valid as if made merely for redeeming the land-tax charged on the land of the living, the land belonging to which has been so sold, and as if such living had not been united to any other living; but in case any consolidated livings, the land-tax charged on which hath been or shall be so redeemed, shall at any time become disunited and held by different incumbents, the incumbent of the living, the land whereof was sold to redeem the land-tax on both, shall be entitled to an annual rent-charge issuing out of the other equivalent to the land-tax charged on it.] Land-tax on united livings.

University. See Colleges.
Voidance. See Avoidance.

Usurpation.

WHEN a stranger that hath no right, presenteth to a church, and his clerk is admitted and instituted, he is said to be an usurper, and the wrongful act that he hath done is called an usurpation. This is the definition given by Lord *Coke* (7); and with regard to the first step towards an usurpation which he there mentions, viz. presenting, it is to be observed, that a presentation made by a stranger, if it be void in law (as in the case of simony, or of a presentation to a donative, or to a church that is full), makes no usurpation against the rightful patron; as neither doth a presentation, where between the usurper and the person upon whom the usurpation is made there is privity in blood, as in the case of coparceners; or privity in the estate, as between lessor and lessee, grantor and grantee, joint-tenants, and tenants in common. In none of these cases is the act of presenting the foundation or commencement of what the law calls an usurpation. And as to the second step mentioned in the aforesaid definition (viz. being admitted and instituted), it must be an admission upon a presentation made; and by consequence not a collation by the bishop; nor the institution of a clerk, who pretending himself to be patron of a church that is void prays the ordinary to admit and institute him, and (without a presentation in form) obtains institution. *Gibs.* 782. [38]

(7) *Co. Litt.* 227., and see *Com. Dig.* tit. *Esglise.* (H 14.)

Also it is said, that no usurpation in time of war putteth the right patron out of possession, albeit the incumbent come in by institution and induction; and time of war doth not only give privilege to them that be in war, but to all others within the kingdom; and although the admission and institution be in time of peace, yet if the presentment were in time of war it putteth not the right patron out of possession. 1 *Inst.* 249. *Wats. c.* 20.

And the reason of this seemeth to have been, because anciently in the time of war the courts were shut up; so that the true patron might not have an opportunity to bring his *quare impedit* within the six months.

For to complete an usurpation, the usurper must be in peaceable possession for six months. At the common law, if a stranger had presented his clerk, and he had been admitted and instituted to a church whereof any subject had been lawful patron, the patron had no other remedy to recover his advowson but a writ of right of advowson, wherein the incumbent was not to be removed: And the reason of this was, 1. To the intent that the incumbent might quietly intend and apply himself to his spiritual charge: And 2. The law intended, that the bishop that had cure of souls within his diocese [would admit and institute an able man for the discharge of the pastoral duty, and that the bishop would do right to every patron within his diocese.] But since the *statute* of the 13 *Ed.* 1. [*Westm. Sec.*] *c.* 5. § 3. to enable the usurper to plead plenarty [of the church of his own presentation] against the true patron, so as to debar him absolutely of that turn, [unless the writ of *darrein presentment*, or *quare impedit*, be purchased within six months. See Advowson, 1 vol. p. 34.] it is not enough that the usurper do present duly, and his presentee be admitted, instituted, and inducted, but also that the church hath been full by the space of six months, and no writ brought to recover the presentation: for within the six months the patron may bring his writ of *quare impedit* or *darrein presentment* (as the case requires), and recover his presentment and possession of the advowson; but if neither of these writs be brought within the six months (that is, so as to bear *teste* within that time) the incumbent is in for life, and the usurpation complete. 1 *Inst.* 344. *Wats. c.* 13.

And heretofore, if an usurper presented, and the clerk was instituted and inducted, and the true patron did not bring his
[39] *quare impedit* within six months, in some cases he did not only lose his turn for that time, but his presentation was gone for ever. *Wats. c.* 7.

Thus in the case of *Ashby* and *White*, *T.* 2 *An.* it was said by Holt, chief justice, that if the purchaser of an advowson in fee simple, before any presentment, suffer an usurpation, and

six months to pass without bringing his *quare impedit*, he hath lost his right to the advowson, because he hath lost his *quare impedit*, which was his only remedy; for he could not maintain a writ of right of advowson: and though he afterwards usurp, and die, and the advowson descend to his heir; yet the heir cannot be remitted, but the advowson is lost for ever without recovery. For where a man hath but one remedy to come at his right, if he loses that his right is gone. *L. Raym.* 954.

But now by the statute of the 7 *An. c.* 18. Forasmuch as the pleading in a *quare impedit* is found very difficult, whereby many patrons are either defeated of their rights of presentation, or put to great charge and trouble to recover their right; it is therefore enacted, that no usurpation upon any avoidance in any church, vicarage, or other ecclesiastical promotion, shall displace the estate or interest of any person entitled to the advowson or patronage thereof, or turn it to a right; but he that would have had a right if no usurpation had been, may present or maintain his *quare impedit* upon the next or any other avoidance (if disturbed) notwithstanding such usurpation. (8) [So that the title of usurpation is now much narrowed, and the law stands on this reasonable foundation: that if a stranger usurps my presentation, and I do not pursue my right within six months, I shall lose that turn without remedy, for the peace of the church, and as a punishment for my own negligence; but that turn (since 7 *Ann. c.* 18.) is the only one I shall lose thereby. Usurpation now gains no right to the usurper, with regard to any future avoidance, but only to the present vacancy; it cannot indeed be remedied after six months are past; but during those six months it is only a species of disturbance.

Disturbers of a right of advowson may be then three persons; the pseudo patron, his clerk, and the ordinary: the pretended *patron*, by presenting to a church to which he has no right, and thereby making it litigious or disputable; the *clerk*, by demanding or obtaining institution, which tends to and promotes the same inconvenience; and the *ordinary*, by refusing to admit the real patron's clerk, and admitting the clerk of the pretender. 3 *Bla. Comm.* 244, 5.

Disturbance of presentation to a church by composition. (See Advowson, 1 vol. p. 34).

By *statute* 13 *Edw.* 1. (*West. Sec.*) *c.* 5. § 2. it is recited, that whereas sometimes an agreement is made between many claiming one advowson, and inrolled before the justices in the roll or by fine in this form: That one shall present the first time, and at the next avoidance another, and the third time a third; and so of many, in case there be many; and when one has presented, and had his presentation, which he ought to have, according to the

(8) This act is not retrospective. *Att. Gen.* v. *Bp. of Litchfield. E.* 1801. 5 *Ves.* 828.

form of their agreement, and at the next avoidance he to whom the next presentation belongeth is disturbed by any that was party to the said agreement, or in his stead: *it is provided*, That from henceforth they that be so disturbed shall have no need to sue a *quare impedit*, but shall resort to the roll or fine: and if the said concord or agreement be found in the roll or fine, then the sheriff shall be commanded that he give knowledge unto the disturber that he be ready at some short day, containing the space of fifteen days, or three weeks, (as the place happeneth to be near or far), for to shew if he can allege any thing wherefore the party so disturbed ought not to have such his presentation: And if he come not, or peradventure doth come, and can allege nothing why the party so disturbed ought not to have his presentation, by reason of any thing done since the fine was made or inrolled, he shall recover his presentation with his damages.

Remedy for a disturbance after a particular estate ended. And where it chanceth that after the death of an ancestor that presented his clerk unto a church, the same advowson is assigned in dower to any woman, or to tenant by the curtesy, and such tenants in dower, or by the curtesy, do present, and after their deaths the true heir is disturbed to present when the church is void; *it is provided*, That from henceforth it shall be in the election of the party disturbed whether he will sue a writ of *quare impedit* or of *darrein presentment*. The same shall be observed in advowsons *demised* for term of life or years, or in fee-tail.]

Usury.

What. 1. USURY in a strict sense seemeth to be a contract upon the loan of money, to give the lender a certain profit for the use of it, upon all events, whether the borrower make any advantage of it, or the lender suffer any prejudice for the want of it, or whether it be repaid on the day appointed or not. 1 *Haw.* 245.

And in a larger sense it seemeth, that all undue advantages taken by a lender against a borrower come under the notion of usury, whether there were any contract in relation thereto or no: as where one in possession of land, made over to him for
[40] the security of a certain debt, retains his possession after he hath received all that is due from the profits of the land. 1 *Haw.* 245.

By the civil law. 2. Use or interest, by the civil law, is divided into lucrative and compensatory. Lucrative is, when it is paid where there hath been no advantage made by the debtor, and no delay or deceit in him: and this is condemned by the civil law. Compensatory is, when it is given where the thing lent hath been

advantageous to the debtor, and disadvantageous to the creditor, that he was not sooner paid: and this is permitted by that law. *Wood. Civ. L.* 213.

And by the civil law (*Swinburn* tells us) a manifest usurer cannot make a testament; and though he make one, it is void in law concerning goods and chattels, unless he satisfy for the usury, or put in caution for satisfaction to be made. *Swinb.* 101.

And as manifest usurers are forbidden to make testaments themselves, or to dispose of their goods by their last wills; so are they forbidden to reap any benefit by the testament of others, or to be capable of any legacy of goods. *Swind.* 376. (*e*)

By the canon law.

3. By a constitution of *Edmund* archbishop of Canterbury: We forbid any man to detain a pledge, after he hath received the principal *out of the profits*, after deduction of the expences, for this is usury. *Lind.* 160.

Out of the profits] The pledge in this case must be supposed to be lands, cattle, or such like, out of which a profit ariseth. *Johns.*

And by *Can.* 109. If any offend their brethren by —— usury, the churchwardens, or questmen and sidemen, in the next presentments to their ordinaries, shall faithfully present every such offender, to the intent that he may be punished by the severity of the laws, according to his deserts: and such notorious offenders shall not be admitted to the holy communion, till they be reformed.

And in general, it is said, that by the ecclesiastical laws, if a man be a manifest usurer, not only his testament is void (as hath been said), but his body, after he is dead, is not to be buried [41] amongst the bodies of other Christian men, in any church or churchyard, until there be restitution or caution tendered, according to the value of such goods. *Swin.* 102. (*g*)

(*e*) These are the anathemas of the popes, and not the rescripts of the emperors. See *Cod.* 5. 5. The punishment by the civil law was once a quadruple penalty. *L.* 2. *Cod. Theod. de Usuris.* But this seems to have been mitigated by *Justinian*, who contents himself with declaring, that whatever is paid more than the legal interest, shall be accounted part of the principal. *Cod.* 4. 32. 26. *Noodt, de Fæn. et Us. lib.* 2. *cap.* 16.

(*g*) Most of the early fathers of the church have condemned usury in the strictest sense, *i. e.* any profit made of the loan of money, as contrary to the divine law. *Alexander* III., in the council of Lateran, prohibited the taking of all interest for money; and it has been observed, that *Gregory* IX. places the chapter of usury after that of theft. But the Mosaic law, though it forbade the Jews to take interest from their brethren, allowed them to take interest from strangers, or to borrow from them on the same terms; and that this law has

By the common and statute laws. [*42] 4. By the laws of king Alfred, it was ordained, that the chattels of usurers should be forfeited to the king, their lands and inheritances should escheat to the lords of * the fee, and they should not be buried in the sanctuary. *Swin.* 102. 1 *Haw.* 245.

Also it seems to have been the opinion of the makers of divers acts of parliament, since the reformation, that all kinds of usury are contrary to good conscience. 1 *Haw.* 245.

By the 5 & 6 *Ed.* 6. *c.* 20. (now repealed), it was enacted, that no person by any means shall lend or forbear any sum of money for any manner of usury or increase to be received or hoped for, above the sum lent.

In the time of queen Elizabeth, when commerce began to extend its influence, a relaxation of the laws against usury followed of course. Thus by the 13 *Eliz.* *c.* 8. it is enacted, that no person shall take above 10*l.* *per cent.* interest; on pain of being punished and corrected according to the ecclesiastical laws heretofore made against usury. (9)

By the 21 *Ja.* *c.* 17. None shall take above 8*l.* *per cent.* (with a proviso, that this statute shall not be construed or

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not condemned the lending of money on interest as *malum in se*, and contrary to the law of nature and of nations, which many have thought, but merely prohibited it amongst the Jews, as dangerous in a political view, considering their itinerant and agricultural life, has been ably demonstrated by Noodt in his Treatise *de Fœnore et Usuris*, *c.* 10. and 11. Nearly the same regulations obtained amongst the Romans in the infancy of the republic; but when commerce was introduced amongst them, the contract of lending money at a certain profit became frequent. The highest rate of legal interest among the Romans, from the time of Cicero to Justinian, was the *centesima* or twelfth part paid every month, amounting to 12 *per cent. per annum;* but the satirists inform us that some usurers exacted three, four, or even five times that profit. Justinian in his code fixed the legal rate of interest at 4, 6, 8, and 12 *per cent.*, according to the station of the lender and the nature of the contract. *Cod.* 4. 32. 26. Various evasions of the laws, however, were practised at Rome, and some of these were not unknown to the canonists; for usurious profit might be secured under the contract of a sale and repurchase, or letting to hire, or might be stipulated for in consideration of the gain of the borrower, or of the loss which the lender suffered by the detention of his money. To these, modern money lenders have added the purchase of annuities; in which, as the purchaser risks his capital, he is allowed to take a greater share of interest (though this must be within equitable bounds). *Vaughan* v. *Thomas*, 1 *Bro.* 556. *Heathcote* v. *Paignon*, 2 *Bro.* 167. But if any of these transactions appear from circumstantial evidence to be merely the covering of an usurious contract, they are held to be within the statute of *Anne*. See *Chesterfield* v. *Janssen*, 2 *Vesey*, 125.

(9) This act has an express saving of the ecclesiastical jurisdiction. See § 9. 1 *Hagg.* *R.* 465. *note*.

expounded to allow the practice of usury in point of religion or conscience).

By the 12 *Car.* 2. *c.* 13. None shall take above 6*l.* *per cent.* (without any proviso).

And by the 12 *An. st.* 2. *c.* 16. None shall take above 5*l.* *per cent.* on pain of treble value of the money lent; and all contracts to the contrary shall be void. (*h*) And every scrivener or solicitor, who shall take for brocage, soliciting, driving, or procuring the loan, or forbearing of any sum of money, above the rate of 5*s.* for the loan, or forbearing of 100*l.* for a year, or more than 12*d.* above the stamp duties for making or renewing the bond or bill for loan or forbearing thereof, or for any counter bond or bill concerning the same, shall forfeit 20*l.*, half to the king and half to him that will sue, with costs; and be imprisoned for half a year.

And therefore in these days a distinction seemeth to be made betwixt usury and legal interest: for what exceedeth the legal interest is properly usury; and he who exacteth it seemeth still [43] to be punishable as an usurer. 1 *Dom.* 126.

And, upon the whole, it seemeth now to be generally agreed, that the taking of reasonable interest for the use of money is in itself lawful; and consequently, that a covenant or promise to pay it, in consideration of the forbearance of a debt, will maintain an action. For why should not one who hath an estate in money be as well allowed to make a fair profit of it as another who hath an estate in land? and what reason can there be that the lender of money should not as well make an advantage of it as the borrower? Neither do the passages in the Mosaical law, which are generally urged against the lawfulness of all usury, if fully considered, so much prove the unlawfulness as the lawfulness of it; for if all usury were against the moral law, why should it not be as much so in respect of foreigners, of whom the Jews were expressly allowed to take it, as in respect of those of the same nation, of whom alone they were forbidden to receive it? From whence it seems clearly to follow, that the prohibition of it to that people was merely political, and conse-

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(*h*) As this act declares all usurious contracts *void*, the indorsee of a bill of exchange, given upon an usurious consideration, cannot recover, although he had no notice of the usury, and had given a valuable consideration for the bill. *Low* v. *Waller*, *Doug.* 736. [But relief is afforded to *bonâ fide* holders for valuable consideration, of bills or notes, drawn after 10th *June* 1818, who have no notice that they were given for valuable consideration, by Sir *Samuel Romilly*'s act, 58 *G.* 3. *c.* 93.] If more than the principal and legal interest be paid, an action will lie to recover the surplus: *per* Ld. *Mansfield*, in *Smith* v. *Bromley*, *Ib.* 696.

quently doth not extend to any other nation. 1 *Haw.* 245. 2 *Burnet, Reform.* 192. [*Bentham on Usury*, 2d edit.]

Wakes. See Church.

[Wales.

DISTRIBUTION of intestates' effects there. See Wills, vol. iv. 477.

Tithes in Wales.

No tithe of marriage goods shall be paid in *Wales*. 2 & 3 *Ed.* 6. *c.* 13. § 16. See Tithes.

Trial of right to advowsons or benefices in Wales.

Before the statute of 27 *H.* 8. *c.* 26. reduced all the lordships marchers of Wales, which were formerly in no county, to be part of either English or Welsh counties, *quare impedits* of churches, *within the lordships marchers*, were impleadable in the king's courts of England by originals out of the chancery directed to the sheriffs of the adjoining English counties, and the issue was tried therein; but since that act, though the jurisdiction of those courts is absolute over such of the former lordships marchers as are annexed to *English* counties, there is none over the rest annexed to *Welsh* counties, and the same rule has prevailed as to actions for *lands* within or without the marches. (1)

In the argument in *Lampley and another* v. *Thomas and another* (2), it is said: Writs of *quare impedit* have often been brought of churches in Wales in the king's courts *here*; but that was either because the dispute was between the lords marchers, or between the Welsh bishops and others, (the former of whom would obey no man *in Wales*,) (3) and because the *princes of Wales* could not direct a writ to a bishop in Wales, on a *quare impedit there* brought, for he would not obey it. (4) It is evident that the *stewards of the courts of lordships marchers* could not direct such a writ to those bishops. (5) But it appears that the king or his justices in Wales might do so; for when the dominion of Wales was lawfully vested in the king of England, his justices there must have the same power as to the bishops that the justices of the courts of the princes of Wales (who originally founded the Welsh bishoprics) had before: and it

(1) See the cases collected in *Vaughan's Rep.* 411, 412. to 417.
(2) As reported in *Wils. R.* 197. citing *Vaugh.* 409.
(3) 36 *H.* 6. *f.* 33. *A. B.* as cited *Vaugh. R.* 409, 410.
(4) 11 *H.* 6. *f.* 3. *A. B.* cited *Vaugh. R.* 409.
(5) *Vaugh. R.* 410, 411.

seems that *quare impedits* of churches *within the principality* were frequent in Wales, and the bishops there served the writs directed to them. (6)

And now by 34 & 35 *H.* 8. *c.* 26. § 12, 13. and 18 *El. c.* 8. § 4. The justices of Wales are empowered to take cognizance of *quare impedits,* and of all actions *real,* with all powers of the court of C. P. in England relating thereto.

Again, by 34 & 35 *H.* 8. *c.* 26. § 32. All actions *real* and *quare impedits,* shall be sued by original writs, sealed with the original seals of the courts of great session, returnable before the Welsh justices at those sessions; but this does not seem to exclude a concurrent jurisdiction of the courts at Westminster. (7)

Service in churches in Wales.

By 13 & 14 *Car.* 2. *c.* 4. § 27. The bishops of *Hereford, St. David's, St. Asaph, Bangor,* and *Llandaff,* and their successors, shall take order that the said book be translated into the British or Welsh tongue, to be used in Wales where the Welsh tongue is commonly to be used: and at the same time, an English book shall be had there likewise, that such as understand the same may have recourse thereunto; and such as do not understand the same may, by comparing both tongues together, the sooner attain to the knowledge of the English tongue.

By § 26. a penalty of 3*l.* per month was imposed on every parish or chapelry, cathedral church, college, or hall, for so long as after the feast of St. Bartholomew 1662 they shall be unprovided with a true printed copy of the said book.

Want of knowledge in the Welsh tongue is a good cause of refusal where the service was to be performed in that language, as rendering the clerk incapable of the cure; nor did it avail to allege that the language might be learned, or that the part of the cure he was incapable of might be discharged by a curate. *Albany* v. *Bp. of St. Asaph, Cro. El.* 119.]

Waste committed in the glebe lands. See Glebe Lands.

Way through the church-yard. See Church.

Way to the church. See Church.

Weapon drawn in the church or church-yard. See Church.

Welsh-tongue; service in it. See Public worship.

Whitsun-farthings. See Pentecostals.

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(6) 10 *H.* 4. *f.* 6. 11 *H.* 6. *f.* 3. cited *Vaugh. R.* 411, 412.

(7) See *The King* v. *Morris,* 1 *Mod.* 64. 68. — *The King* v. *Athol, Stra.* 553.

Wills.

THE law affecting *Papists* in particular, with regard to wills and administrations, is treated of under the title Popery.

I. *Who may make a will.*

Difference between wills and testaments.

1. *Testament and will*, strictly speaking, are not synonymous. A will is properly limited to land, and a *testament* only to chattels requiring executors, which a will only for land doth not require. So every testament is a will; but every will is not a testament. *God. Orph. Leg.* 4, 5.

But as authors in treating upon this subject have not adhered to this distinction, so throughout this title the words *will* and *testament* are used indiscriminately.

So also the word *devise* seemeth properly applicable to lands; *bequest*, *bequeath*, *give*, *dispose*, and such like, to goods; yet, forasmuch as authors do generally confound them, and because that propriety of expression is not so much regarded in wills as in other legal instruments of conveyance, so long as the testator's intention doth sufficiently appear; therefore it hath not been thought necessary in these different ways of expression to observe a scrupulous exactness, but to take the words in the several authors as they stand; and this so much the rather, as it seemeth

in general to be an unwarrantable liberty, in reciting matters of law, from books of acknowledged authority, to presume to vary the expression without necessary or urgent cause.

[The terms *will* and *last will* are synonymous; the general meaning of *last will* being that will which is to be operative at the testator's death. *Walpole* v. *Cholmondeley*, 7 *T. Rep.* 138.]

2. It doth not seem to be clearly settled what shall be the lowest age at which a person shall be allowed to make a testament of goods and chattels. **Infant.**

Dr. *Gibson* says, when prohibitions have been prayed, on suggestion that the testator was not in one case seventeen, in another case eighteen years of age, which it was said were the lowest ages assigned by the common law for making a testament of goods and chattels; they were denied in both cases for the same reason, namely, that it belongs to the ecclesiastical court to judge when a person is of age to make a will; and if an inferior court had given sentence against their own law, there was no remedy but by appeal. *Gibs.* 461. 2 *Mod.* 315. *T. Jones*, 210.

And one reason of limiting the same to the age of seventeen may be, because (as it is agreed on all hands) that is the proper age at which a person is allowed to take upon himself the office of an executor; administration during the minority of an infant executor ceasing at that age. (8)

In the case of *Bishop* and *Sharp*, *M.* 1704, in the court of chancery, it is said to have been agreed, that a female may make a will at twelve years; and a male at seventeen, or at fifteen, if proved to be a person of discretion. 2 *Vern.* 469.

Dr. *Godolphin* says, an infant male at the age of fourteen years, and female at the age of twelve years, may make a testament of goods and chattels. *God. O. L.* 23.

And in the case of *Hyde* and *Hyde*, *H.* 8 *Ann.*, it is said to have been agreed, that a male infant of fourteen years of age, and a female of twelve years of age, might make will of a personal estate; and it was said in this case, that it was so agreed by the lord keeper *Wright* in the case of *Sharpe* and *Sharpe*, wherein they followed the civil law of Justinian for their consent to marry at such ages. *Gilb. Rep.* 74. (9)

And it is true that Justinian fixes the *testamentary* age and the age of *puberty* alike, to wit, in the male at the age of four-

(8) Where an infant is sole executor, administration *with will annexed* is granted to the guardian or other till his age of twenty-one, when probate is granted to him. 38 *G.* 3. *c.* 87. § 6. So in *Ireland*, 58 *G.* 3. *c.* 81. § 1, 2. See *infra*, 284.

(9) So held in *Exp. Holyland*, *E.* 1805, 11 *Ves. R.* 11. The will of a schoolboy of sixteen in favour of the schoolmaster was established, when no evidence of fraud, improper influence, or control, was shown. *Arnold* v. *Earl*, *cor.* Sir *Geo. Lee*, 5th *June* 1758, *MSS. Cas.* 85. *Ames* v. *Ward*, *cor.* Sir *Geo. Hay*, *T. T.* 1767, *MSS. Cas.* 85.; and

teen; and in the female at the age of twelve. But by the com-
[46] mon law of England, the age of *discretion*, both in the male and female, is the age of fourteen; although the same common law admits of Justinian's distinction as to the age of *puberty* or consent to marriage.

And by the author of the *Law of Executors*, who is said to have been judge Doddridge, it seems to be laid down generally, that an infant at the age of discretion, to wit, the age of fourteen years, may make a will of goods and chattels. *Law of Ex.* 10.

And Mr. *Wentworth* saith, he thinks that at the age of fourteen, being in the judgment of law the age of discretion, a person may make a testament. *Wentw.* 214.

Finally, Sir *William Blackstone* says, Infants, under the age of fourteen if males, and twelve if females, cannot make a testament: which is the rule of the civil law. For though some of our common lawyers have held that an infant of any age (even four years old) might make a testament, and others have denied that under eighteen he is capable; yet as the ecclesiastical court is the judge of every testator's capacity, this case must be governed by the rules of the ecclesiastical law. 2 *Black.* 497.

Note: It is Mr. *Perkins* whom all the subsequent authors quote (*Perk.* § 503.), with some degree of wonder, for asserting that an infant of four years of age may make a testament. But surely this must have been an error of the press; which might possibly enough happen from a similitude of the words, or especially of the figures 4 and 14.

But by the statute of the 34 & 35 *H.* 8. *c.* 5. § 14. *Wills or testaments made of any manors, lands, tenements, or other hereditaments, by any person within the age of twenty-one years, shall not be taken to be good or effectual in law*; for until that time, by the common laws of this realm, they are accounted infants. *Swin.* 74. 6th *edit.*

But by custom in particular places, they may devise lands before the age of twenty-one. *God. O. L.* 21. *Wentw.* 214.

But no custom of any place can be good, to enable a male infant to make any will before he is fourteen years of age. *Law of Exec.* 153.

Idiot.

3. An idiot is justly excluded from making a testament. *Swin.* 8.

Now an idiot, or natural fool, is he, who notwithstanding he be of lawful age, yet he is so witless that he cannot number to twenty, nor can tell what age he is of, nor knoweth who is his father or mother, nor is able to answer any such easy question;
[47] whereby it may plainly appear, that he hath not reason to discern what is to his profit or damage, nor is apt to be informed

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cited by Dr. *Swabey*, in *Waller and another* v. *Heseltine and Burgh*, 1 *Phill. R.* 159, 160.

or instructed by any other; and such an idiot cannot make any testament, nor may dispose either of his lands or goods. *Swin.* 79.

4. Mad folks and lunatic persons, during the time of their furor or insanity of mind, cannot make a testament, nor dispose of any thing by will; and the reason is most forcible, because they know not what they do: for in making of testaments, the integrity and perfectness of mind, and not health of the body, is requisite. *Swin.* 76. **Lunatic.**

Howbeit, if these mad or lunatic persons have clear or calm intermissions, then during the time of such their quietness and freedom of mind, they may make their testaments. *Swin.* 76.

And it is sufficient for the party which pleadeth the insanity of the testator's mind, to prove that the testator was beside himself before the making of the testament, although he do not prove the testator's madness at the very time of making the testament: the reason is, it being proved that the testator was once mad, the law presumeth him to continue still in that case, unless the contrary be proved. For like as the law presumeth every man to be an honest man, unless the contrary be proved, and being proved, then he which is evil to be evil still; so concerning furor, the law presumeth every man to have the use of reason and understanding, unless the contrary be proved; which being proved accordingly, then he is presumed in law to continue still void of the use of reason and understanding, unless the testator were besides himself but for a short time, and in some peculiar actions, and not continually for a long space, as for a month or more; or unless the testator fell into some frenzy upon some accidental cause, which cause is afterwards taken away; or unless it be a long time since the testator was assaulted with the malady: for in these cases the testator is not presumed to continue in his former furor or frenzy. *Swin.* 78.

Yet it is a hard and difficult point, to prove a man not to have the use of understanding or reason: and therefore it is not sufficient for the witnesses to depose that the testator was mad or besides his wits, unless they render or yield a sufficient reason to prove this their deposition; as that they did see him do such things, or heard him speak such words, as a man having [48] reason would not have done, or spoken. *Swin.* 78. (*i*)

(*i*) Questions upon the general sanity of testators, or the prevalence of a lucid interval at the time of executing their will, occur frequently both in the civil and ecclesiastical courts. They are usually determined on the particular circumstances of each individual case; for according to lord *Thurlow*'s opinion in *Att. Gen.* v. *Parnther*, "it seems scarcely possible to extract from any particular case of this kind that which will apply to any other." But, his lordship adds, "it is of equal importance that the evidence in support of the allegation of a lucid interval, after derangement at any period has been esta-

Persons of a weak understanding.

5. E. 3 Ja. in the star chamber. In *Combe*'s case it was agreed by the judges, that sane memory for the making of a will is not at all times when the party can speak yea or no, or had life in him, nor when he can answer to any thing with sense; but he ought to have judgment to discern, and to be of perfect memory, otherwise the will is void. *Mo.* 759.

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blished, should be as strong and as demonstrative of such facts as where the object of the proof is to establish derangement." Indeed if lunacy be once established, it is a matter of nice investigation to say, what shall be evidence of such a remission or intermission of the disorder, as shall allow the lunatic to dispose of his property by will. The points generally insisted upon in proof and argument, relate to the state of the testator before making the will, the will itself, and his subsequent conduct. And if the circumstances of the case, among which may be reckoned the nature of the disorder, afford any reasonable ground to suppose that a lucid interval may have prevailed, it will be difficult to set aside the will, if it be rationally drawn up both with regard to the disposition of the property and the aptness of the expression to effectuate the testator's intention, especially if it be written entirely by himself; for these circumstances seem to establish that sound disposing mind and memory which the law requires. Thus in the case of *Cartwright* v. *Cartwright*, *Mich.* 1795 [1 *Phill. R.* 90. to 122.], before the delegates in appeal from the prerogative court of the archbishop of Canterbury, it appeared that the testatrix was insane from 1774 to 1794, when she died; and though decent in her appearance, always answered to any enquiries about her health, *that she was dying, for that all her bones were broken.* She had made a former will, and had been heard to lament that she had destroyed it, adding, that she had lost her senses. In November 1794 she repeatedly called for pen, ink, and paper, with which she was at last indulged; the doctor who attended her saying, that she must be pacified by compliance, but that nothing she could write would be valid. Her hands being loosed from a strait waistcoat, she walked about in a great agitation, wrote on several pieces of paper, which she afterwards tore, and at last produced a most perfect and well-written will, in which she preferred *nieces, the descendants of a sister of the whole blood, to sisters of the half blood;* being asked if a witness was necessary to authenticate the will, she answered no, for that her will was only of personal property; and sealing it, she delivered it to a friend, and was heard afterwards to express satisfaction at what she had done. She soon after relapsed into her disorder, in which she continued to her death. And the delegates affirmed the judgment of Sir W. Wynne, the judge of the prerogative court, establishing the will.

But if other circumstances in proof, added to the nature of the bequests, should raise a presumption that the will originated in insanity, an aptness of expression will not alone suffice to establish it. Thus in the case of *Clark* v. *Lear and Scarwell*, in the ecclesiastical courts, in *March* 1791 [cited 1 *Phill. R.* 119.], the testator, a middle-aged man, being a lunatic, escaped from his keeper, and at a watering

And in the case of the marquis of *Winchester*, *T.* 41 *Eliz.*, it is said, that by the law it is not sufficient that the testator be of memory, when he maketh his will, to answer to familiar and usual questions; but he ought to have a disposing memory, so that he be able to make disposition of his estate with understanding and reason: and this is such memory as the law calls sound and perfect memory. 6 *Co.* 23. (*k*)

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place fell in love with a young lady, to whom he afterwards sent in very polite terms a present of a lottery ticket; and making a will, rational on the face of it, left her a legacy of 1000*l.* But though it was argued that all this had the appearance of reason, the will was set aside as being bottomed in insanity.

[The *criteria* by which the capacity of a testator is to be examined, especially where there is much contradictory evidence, can only be drawn from his acts. The mere opinions of witnesses on this point being drawn from very different standards, are of little weight, and must fluctuate, from their different abilities to form an opinion, from their different opportunities of seeing the person, and from the different condition of the testator's mind or humour at different times. Thus, the capacity of a testator of a very advanced age, and subject to occasional incapacity from violent nervous attacks, was established on the proof of acts inferring his general possession of reason, notwithstanding much conflicting evidence of witnesses. *Kinleside* v. *Harrison*, 2 *Phill. Rep.* 449—574.

A rational act rationally done is a proof of a lucid interval. See two cases of wills established on this principle; *White* v. *Driver*, 1 *Phill. Rep.* 84. *Cartwright* v. *Cartwright*, *id.* 90.

Partial insanity may invalidate a will which is fairly to be inferred the direct offspring of that partial insanity; and an allegation by an only child pleading partial insanity, in order to defeat a will, was admitted; but the whole history of the insanity of the testator, as respects the particular person or fact, must be minutely detailed from an early period. *Dew* v. *Clark and Clark*, 1 *Add. Rep.* 274.

A will partially defaced by a testator while of unsound mind, is to be pronounced for as it existed in its integral state, where that is ascertainable. *Scruby and Finch* v. *Fordham and others*, 1 *Add. Rep.* 74.; and see *Doe* d. *Perkes* v. *Perkes*, 3 *B. & A.* 489.

If a testator of impeached sanity do an act in relation to his will at a time when his then state of mind is not ascertained by extrinsic evidence, it must be inferred from the act itself. S. C.

Wills made in jest] There might be a possible case where the court would receive evidence against the fact of execution, on the ground that the transaction was throughout a jest, if the paper itself contained any thing ridiculous or absurd in its dispositions. *Trevelyan* v. *Trevelyan*, 1 *Phill. Rep.* 153, 154.

A will not made with a testamentary intention, but with a jocular view in a moment of levity, set aside. *Nichols* v. *Nichols*, 2 *Phill. Rep.* 180.]

(*k*) It is not sufficient that the testator be corporally present when he signs his will, if in truth he be absent as to mental purposes. *Right* v. *Price*, 1 *Doug. Rep.* 241.

But every person is presumed to be of perfect mind and memory unless the contrary be proved: and, therefore, if any person go about to impugn or overthrow the testament, by reason of insanity of mind, or want of memory, he must prove that impediment. *Swin.* 77. (1)

But if a man be of a mean understanding, neither of the wise sort nor of the foolish, but indifferent, as it were betwixt a wise man and a fool, yea, though he rather incline to the foolish sort; such an one is not prohibited to make a testament: unless he be yet more foolish, and so very simple and sottish, that he may
[50] easily be made to believe things incredible or impossible, and hath not so much wit as a child may have of ten or eleven years of age, who is therefore intestable by the law, for want of judgment. *Swin.* 80.

Person in liquor.

6. He that is overcome with drink, during the time of his drunkenness is compared to a madman; and therefore if he make his testament at that time, it is void in law. Which is to be understood, when he is so excessively drunk, that he is utterly deprived of the use of reason and understanding: otherwise if he be not clean spent, albeit his understanding be obscured, and his memory troubled, yet he may make his testament being in that case. *Swin.* 83.

Married woman.

7. By a constitution of archbishop Stratford: Whereas divers persons do hinder or endeavour to hinder the free making and execution of the testaments of women, either sole or married; we decree that none shall henceforth do the same, on pain of the greater excommunication. *Lind.* 173.

And *Lindwood*, in his commentary hereupon, contends for the capacity of married women to make a will, in pursuance of this constitution; especially where such woman hath brought a large fortune to her husband, who perhaps had nothing of his own before. *Lind.* 173.

Two years after the making of this constitution, we find a petition of the commons in parliament, that whereas there was a constitution made by the prelates, that women married [*niefs and femes*] might make a will, it might be ordained that the people should remain in the same state as they had been accustomed to be in the time of the king's progenitors: To which it was answered as to this matter, that the king will that law and reason be done. *Gibs.* 461. [*Rot. Parl.* 18 *Ed.* 3. 12.]

(1) Capacity is generally matter of opinion, and to be considered with respect to the abilities, opportunities of the witnesses, and the state of the testator's mind at different times; extreme age only raises a doubt of capacity so far as to excite the vigilance of the court, while considerable alterations in an instrument solemnly and cautiously made will farther excite its jealousy. *Kinleside* v. *Harrison*, 2 *Phill. R.* 449.

And by the statute of the 34 & 35 *H.* 8. *c.* 5. it is enacted, that wills or testaments made of any manors, lands, tenements, or other hereditaments, *by any woman covert*, shall not be taken to be good or effectual in the law. § 14. (*l*)

And also of goods and chattels, the wife cannot make her testament without the licence or consent of her husband; because by the laws and customs of this realm, so soon as a man and woman are married, all the goods and chattels personal that the wife had at the time of the spousals or celebration of the marriage or after, and also the chattels real if he overlive his wife, belong to the husband, by reason of the said marriage; and therefore with good reason she cannot give that away which was hers, without the sufferance or grant of the owner. *Swin.* 88, 89. [51]

And albeit the testament be made before the marriage, yet she being intestable at the time of her death, by reason her husband is then living, the testament is void; for it is necessary to the validity of such testament, that the testator have ability to make a testament, not only at the time of making thereof, when the testament receiveth its essence and being, but also at the time of the testator's death, when the testament receiveth its strength and confirmation. *Swin.* 88. (2)

And albeit the wife do overlive the husband, yet the testament made during the marriage is not good; because she was intest-

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(*l*) But nevertheless a *feme covert* may have a power given her by settlement, so to dispose of land by writing in the nature of a will, as to prevent its going to their heir; namely, 1. By vesting the legal estate in trustees, and giving her a power to appoint the uses: 2. By agreement; which, according to some authorities, a court of equity will compel the heir to execute by a proper conveyance. *Wright* v. *Ld. Cadogan*, 6 *Bro. P. C.* 156., cited and agreed by Ld. *Kenyon*, in *Doe* v. *Staple*, 2 *T. Rep.* 684. Although others seem to doubt whether such an agreement while resting in agreement, though it bind the husband, [and defeats his right of administering to his wife's effects, 2 *Bla. C.* 54.] can defeat the right of the heir at law. See *Peacock* v. *Monk*, 2 *Ves.* 191.; and Ld. *Thurlow*'s opinion in *Hodsden* v. *Lloyd*, 2 *Bro. C. C.* 534. [It seems from some of the cases that the execution by a feme covert of a power to make a will is considered as a testamentary disposition, and not as a will. *Cotter* v. *Layer*, 2 *P. W.* 624. *Henley* v. *Philips*, 2 *Atk.* 49. *Southby* v. *Stonehouse*, 2 *Ves.* 612. *Jenkin* v. *Whitehouse*, 1 *Burr.* 431. But in *Marlborough* v. *Godolphin*, 2 *Ves.* 75., Ld. *Hardwicke* held that a *feme covert* might not only make a writing *in nature* of a will, but also a proper will, if with consent of her husband. See *Cro. Car.* 219. 2 *Atk.* 49. 1 *Ves.* 139. *Doug.* 707.; and see 2 *Bla. Com.* 498, 499. A wife whose husband is banished by parliament, may make a will and act as a *feme sole*. *Portland* v. *Prodgers*, 2 *Vern. R.* 104.]

(2) 4 *Rep.* 60. 2 *P. Wms.* 624.

able at the time of the will making: but if the testament being made during the coverture, she do approve and confirm the same after the death of her husband; in this case the devise is good; by reason of her new consent, or new declaration of her will: for then it is as it were a new will. *Swin.* 88.

And although the will be made before marriage, and the wife survive the husband, yet it seemeth that the will shall not revive upon the husband's death. As in the case of Mrs. *Lewis* some years ago, before the delegates: Mrs. Lewis, a widow, made a will; soon after she married again; in some time her second husband died, and she again became a widow, without any children by either husband. The will which she made in her first widowhood remained; and being found after her death, the
[52] question was, whether it was a good will or not. The counsel for the will cited many authorities from the civil law, and shewed, that among the Romans, if a man had made his will, and was afterwards taken captive, such will revived and became again in force, by the testator's repossessing his liberty. But it was observed on the other hand, that marriage is a voluntary act, but captivity is the effect of compulsion. And the will was adjudged not to be good. — And in the case of *Forse* and *Hemblinge*, *M.* 30 & 31 *El.* (4 *Co.* 60, 61.), it was said, that if a man of sane memory make his will, and afterwards becometh of non-sane memory, this is no countermand of the will, because this is done by the act of God: But marriage is the voluntary act of the party, and amounteth in law to a countermand of the will. (*m*)

But yet nevertheless, upon the licence or consent of the husband, the wife may make her testament even of his goods. *Swin.* 89. (3)

But albeit the husband do give licence to his wife to make a will of his goods; yet he may revoke the same, not only at the making of the will, but after her death, at the least (*Swinburne* says) before the will be proved. *Swin.* 89.

Yet such his consent (Dr. *Gibson* says) shall be implied,

(*m*) S. P. On the will of Catharine Calver, who, by marriage articles between her and Dr. Hibbins, had a power to dispose of her property by will *after marriage* subsequent to the articles; but a few hours *before the marriage* she made a will, which was held to be revoked by the marriage. *Doe* d. *Hodsden* v. *Staple*, 2 *T. Rep.* 684. *Hodson* v. *Lloyd*, 2 *Bro. C. C.* 534.

(3) A man by will empowered his wife to dispose of his personal estate *with consent* of his trustees; the wife, without such consent, cannot by will bequeath it; and therefore the husband, as to that part, died intestate. *Sympson* v. *Hornsby*, *Pre. Ch.* 452. Where personal property is given to a married woman for her sole and separate use, she may dispose of it by will without the assent of her husband. 3 *Bro. C. C.* 8. 10. 1 *Ves. jun.* 146. *Bunb. R.* 187.

until the contrary do appear; and if after her death he doth consent, he can never afterwards dissent; and if immediately upon the death of the wife, he discourses and deals with the executor whom she hath appointed, as executor, as in recommending to him a painter for escutcheons, a goldsmith for rings, or the like, this is a good assent, and makes it a good will; and though after such assent given, he do upon the sight of the will dislike it, and oppose the probate, or enter a caveat, such disagreement shall not hurt the will: and when there is an express agreement or consent that a wife may make a will, a little proof will be sufficient to make out the continuance of that consent after their death; but it is necessary to prove a *disagreement* made, in a solemn and formal manner, in express words, and not by implication. *Gibs.* 461, 462.

But by lord *Hardwicke*, in the case of *Henley* and *Philips*, July 17. 1740. Though a feme covert has power of disposing of a sum of money or any other thing, by a writing purporting to be a will; yet after the wife's death, the proving it in the spiritual court will not give it the authority of a will, but it will still be considered as an instrument only, or an appointment of such sum or other thing in pursuance of the power; and before it is proved in the spiritual court as a testamentary conveyance, the husband ought to be examined there as to his consent; nor till then will it have the effect and operation of a will. 2 *Atk.* 49. (4) [53]

And when such a will was brought to the prerogative court to be proved, and a prohibition was prayed for the husband upon this suggestion, that the testatrix was a feme covert, and so disabled by the law to make a will, it was granted; because though the husband may by covenant depart from his right, and suffer

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(4) Per *Sir W. Wynne* in *Curgenzen* v. *Watkins*, Arches, 21st *Nov.* 1788, *MSS. Cas.* 73. The ecclesiastical court has a complete jurisdiction over a legacy given under the will of a married woman, though the court of chancery has a concurrent jurisdiction. Probate of a will was refused to the executor, as being the will of a married woman, and therefore invalid; and administration was committed to her husband, whose interest as such was denied by the executor, but whose marriage in Ireland was held to be proved by circumstantial evidence, though attempted to be impugned under 19 *G.* 2. *c.* 13. *Ir.*, as having been celebrated by a popish priest. *Steadman* v. *Powell*, 1 *Add. Rep.* 58.

Will of the sovereign] The court has no jurisdiction over the will of a sovereign, under which a direct claim is made on the reigning sovereign through the king's proctor: and application to the court for its process, calling on the latter to see a testamentary paper of king George the Third propounded, was rejected, 1 *Add. Rep.* 255. *Qu.* If the will of a deceased sovereign raised a question merely and exclusively between subject and subject? See *id.* 263—265. 4 *Inst.* 335.

his wife to make a will, yet whether he hath done so or not, shall be determined by the common law. *Gibs.* 462. (*n*)

If a woman have a lease, an estate by extent, the next avoidance of a church, or other chattel real; these are not devested out of her into her husband by marriage; but in case she overlive him, they continue to her as before, no alienation or alteration having been made by the husband, who had power to dispose of them by gift in his lifetime, though not by his will: yet such a woman in her husband's lifetime cannot of or for these things, without her husband's assent, make an executor or will; but she dying before him, they would by the operation of law accrue to him. *Went.* 198. *Law of Test.* 33.

Another kind of goods, or rather interest, a woman may have, to wit, debts or things in action, which, as the former, are not devested out of her by marriage into her husband, nor yet can she thereof make an executor without her husband's assent, although they be one degree farther from the husband than the said chattels real; for that though the husband do overlive the wife, he shall not be intitled to them, as to the former. But if the wife makes him executor of these, as she may; or if after her death he takes out administration of her goods, then he is thereby intitled to them. *Went.* 199. *Law of Test.* 33, 34.

[54] But it is said, if a woman hath pin-money or a separate maintenance settled on her, and she by management or good housewifery saves money out of it, she may dispose of such money so saved by her, or of any jewels bought with it, by writing in nature of a will, if she die before her husband, and shall have it herself if she survive him, and the same shall not be liable to the husband's debts. *Swin.* a. 95. *Viner, Baron and Feme, R.* a. 16. (*o*)

And although a feme covert is so entirely under the power of her husband, that she cannot make what in propriety of speech is a will, yet she may make what is called an *appointment*. And the usual way is, for the intended husband to enter into a bond before marriage in a penal sum, conditioned to permit his wife to make a will, and to dispose of money or legacies to such a value, and to pay what she shall appoint, not exceeding such a

(*n*) *Vid. infra, Jenkin* v. *Whitehouse.*

(*o*) [*Prec. Chanc.* 44.] And in *Fettiplace* v. *Gorges*, 1 *Ves. jun.* 46. [3 *Bro. C. C.* 8.] Ld. *Thurlow* C. held that a wife having personal property secured to her sole and separate use, took it with all the incidents of property, and might therefore dispose of it and its produce by will, without the consent of her husband. [*S. P. Rich* v. *Cockell*, *E.* 1804, 9 *Ves.* 375. So if it were left during her coverture to her sole and separate use. *Tappenden* v. *Walsh*, 1 *Ph. R.* 352.; and other cases, *id.* 353. So if a power was given to her in form of a bond. *Moss* v. *Brander*, 1 *Phill. Rep.* 254.

value; and in such case, if after the marriage, and during the coverture, she makes any writing purporting her will, and disposes legacies to the value agreed, though in strictness of law she cannot make a will without her husband; yet this is a good *appointment*, and the husband is bound by his bond to perform what is appointed. *Swin.* a. 94. 1 *Vern.* 244. (5)

And in 1 *Mod.* 211. it is said, that the husband may bind himself by covenant or bond, to permit his wife by will to dispose of legacies, and this will be such an appointment as the husband will be bound to perform (*p*); yet it doth not operate as a will, neither ought it to be proved in the spiritual court; for the property passeth from him to her legatee, and it is his gift: And therefore if the legatee dieth before the wife, such legacy is not lapsed; for this in strictness is only the execution of a trust, and the executor or administrator of such legatee shall be intitled.

But in the case of *Jenkin* v. *Whitehouse*, *M.* 31 *G.* 2. by lord *Mansfield* Ch. J. In a cause of *Ross* v. *Ewer*, in chancery, July 5. 1744 [3 *Atk.* 160. 356.], there was a power to a feme covert to appoint by will. And the lord chancellor held clearly, though such will operates as an appointment, that it must be [55] proved in the spiritual court; and he would not proceed, till the will was so proved. He said, it was not material for him in that case to consider of the precise form in which it was to be proved, whether by a strict probate, or by granting administration with the appointment in nature of a will annexed; and therefore that point was not entered into: but the fact, that the paper was her will, in case she had power to make one, must be established by the ecclesiastical court; for such an appointment is in the nature of a will, and attended with all the consequences of a will. And as to the point, that money disposed under the execution of a power by such a will should not lapse; this was fully considered, and contradicted, in the cause of *The Duke of Marlborough* v. *The Earl of Carlisle and others*, Nov. 26. 1750. The cases that have been cited in this cause shew, that admini-

(5) A feme covert was executrix of her son, who also devised a bond "to her sole and separate use." *Per. Cur.* Clearly she is not only executrix, but the bond is devised *to her sole and separate use*, which, in a court of equity, vests the interest in her as much as if the son had vested it in trustees for her separate use; for equity has frequently decreed a husband to stand as trustee for the separate use of his wife. *Lady Suffolk*'s case, who married Serjt. Maynard; Sir Jos. Hern's wife; *Seymour* v. *Dilkes*, *Nov.* 17. 1718; *Rolfe* v. *Budder*, *Bunb. Rep.* 187.; and all the cases shew that the personal property, when it can be enjoyed separately, must be so enjoyed with all its incidents, and the *jus disponendi* is one of them. *Fettiplace* v. *Gorges*, 3 *Bro. C. C.* 10. 1 *Ves. jun.* 46.

(*p*) *Marriot* v. *Kingsman*, *Cro. Car.* 219.

stration may be granted, with the appointment annexed; which proves it to be testamentary: For nothing can be annexed to an administration, but a testamentary disposition; which is proved and established by the ecclesiastical court in that form. (q) But if the question be, whether the wife had a power to make an appointment in the nature of a will, and thereby to deprive the husband of any benefit, which by law would devolve upon him in consequence of her death; that is a question proper to be considered at law: and if she had no such power, this court will grant a prohibition. 1 *Burr. Rep.* 431.

If in the case where a feme covert cannot make a testament without the husband's licence, the husband grants a licence to the wife to make a testament of a certain portion of his goods, and the wife so licensed doth make one testament, and afterwards another, and perhaps a third or fourth; the licence shall be understood of the last testament, and not of the first. *Law of Test.* 37.

[Will of feme covert executrix.] [56] But if a feme covert is executrix to some other person, and in that right hath divers goods and chattels; these are not devested out of her, because she hath them not merely to her own use, but as representing the person of another: and therefore in this case (*Swinburne* says) the wife may, for the continuation of the executorship, make an executor, and consequently a testament, without the consent or assent of her husband. *Swin.* 89. *Law of Test.* 34. (r)

But this rule, that a feme covert executrix may make her will of those goods whereof she is executrix, is restrained in two cases:

The first is, where she doth not make an executor, but bequeaths the goods whereof she is executrix, by devise or legacy; in this case the will is void, because an executor may not dispose of the goods of the testator otherwise than to the use of

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(q) That the will of a feme covert cannot be given in evidence till it has been proved in the ecclesiastical court, see also *Stone* v. *Forsyth*, 2 *Doug. Rep.* 707., where lord *Mansfield* says, if the ecclesiastical court will not grant probate, the proper course is to appeal to the delegates. Mr. Douglas, in note [† 150] *ib.* observes, that the regular course in cases like this, is for the spiritual court not to give *probate* of the will, but *administration* with the will as a testamentary paper annexed. [Probate *per testes* of a will made by a feme covert under a power is sufficient proof, without other proof; because as to that purpose the husband has made her a feme sole, and no prohibition will lie. *Balch* v. *Wilson*, *Pre. Cha.* 84.]

(r) See this doctrine agreed by Ld. *Thurlow* C. in *Hodson* v. *Lloyd*, 2 *Bro. C. C.* 543. *et seq.* But if an executrix use the goods of a testator as her own, and afterwards marry, and then treat them as the goods of her husband, she will not be allowed to object to their being taken in execution for her husband's debts. *Quick* v. *Sir Wm. Staines*, 1 *Bos. & Pul.* 293.

the testator, to the payment of his debts and performance of his will, and therefore may not give or devise the same by legacy; for that were to dispose of the testator's goods as if they were the proper goods of the executor, and to convert the same to the private use of the legatee and not the use of the testator. But when an executor doth only make another executor, the second executor doth stand chargeable and accountable for the distribution of the first testator's goods to the use of the same testator as did the former executor, and is not by the laws of the land reputed for the executor of the executor, but of the former testator, and so is not a legatee. *Law of Test.* 35, 36. *Swin.* 90.

The second is, where she is not only executrix, but legatee also, and hath accepted of the thing bequeathed not as executrix, but as legatee; and in this case the will of the feme covert is also void. For she taking the thing bequeathed not as executrix, but as legatee, doth thereby make it her own proper goods, and consequently her husband's; and therefore cannot be given from him, without his licence or consent. If it doth not appear whether the wife took the thing bequeathed as executrix or legatee; it shall be presumed she took it as executrix. *Swin.* 90. *Law of Test.* 36.

And although a feme covert being executrix may make her testament, and appoint an executor of those goods which she hath as executrix, and not as legatee, without her husband's assent; yet the profit and fruit which arise out of those goods which she hath as executrix during the marriage, as calves, [57] lambs, and such like profit of kine, sheep, and cattle, do belong to the husband, and not to herself as executrix; and therefore she cannot make her testament of such fruits and profit, without her husband's approbation. *Swin.* 90. *Law of Test.* 36.

H. 4 *G.* 2. *King* and *Bettesworth.* Mandamus to grant administration to John Cullom, or Joan his wife. Return; that by articles before marriage it was agreed, that the wife should have power to make a will, and dispose of her leasehold estate; that pursuant to this power, she made a will, and her mother executrix, who has duly proved the same. To this return it was objected, that she might have things in action not covered by the deed, and the husband was in all events entitled to an administration to them. On the other hand, it was insisted, that with the consent of the husband she might make a will; and here is his consent by being party to the deed. But by the court; A general consent to make a will doth not seem sufficient, but there should be a consent to that particular will: besides, this is going beyond her power, which did not extend to the making an executor. This is rather an appointment, which in equity will controul the administration as to the leasehold estate, than a will: And as there may be other effects not covered by the deed,

the return is ill, and there must be a peremptory mandamus. *Stra.* 891.

Person under fear of restraint.

(*s*) 8. That testament is to be repelled, which is made upon just fear, that is, such a fear as may move a constant man; as the fear of death, or of bodily hurt, or of imprisonment, or of the loss of all or most part of one's goods, or the like. Whereof no certain rule can be delivered, but it is left to the discretion of the judge, who ought not only to consider the quality of the threatenings, but also the persons as well threatening as threatened; in the threatening, his power and disposition; in the person threatened, the sex, age, courage, pusillanimity, and the like. But if the testator afterwards, when there is no cause of fear, do ratify and confirm the testament, it seemeth to be good in law. *Swin.* 475, 476.

If a man makes a will in his sickness, at the over importunity of his wife, to the end he may be quiet; this shall be said to be a will made by restraint, and shall not be good. *Styl.* 427. [8 *Vin. Ab.* 167.]

But if the person who makes the motion be not any ways suspected, and it also appears by some conjectures, that the sick [58] person had a desire to make his will; in this case the testament is good. *Law of Test.**53. (*t*)

(*s*) *T.* 42 *G.* 3. *Scammell* v. *Wilkinson.* Prohibition is to the spiritual courts, if a suit be instituted to obtain a *general* probate of the will of a woman made during coverture, though *with* her husband's consent, and though she *survived* him: for he could not by any assent of his enable her to dispose by any will made during her coverture of property, which she might acquire after his death, but only of property over which he himself had a disposing power. 2 *East's Rep.* 552.

(*t*) Civilians, whilst they declare that force and fraud vitiate a will, tolerate those alluring manners, and that engaging address, by which infirm testators are too often induced to disinherit their immediate heirs. *Dig.* 28. 5. 70. and 29. 6. 3. *Cod.* 6. 34. 3. *Sande, lib.* 4. *tit.* 1. *def.* 11. But with two exceptions: 1. Unless the testator be induced to make his will by false suggestions and lies, which are in truth a species of fraud; 2. Unless prayers and intreaties be so frequently repeated, that they operate as a sort of force. See *Sande, ubi supra,* and *Swinburne, pl.* 7. § 4. and 18., with the authorities there cited. [*Importunity,* in its legal acceptation, must be such as the testator is too weak to resist, and in such a degree as to take away his free agency, rendering the act no longer the act of the deceased. *Kinleside* v. *Harrison,* 2 *Phill. R.* 449.] With us also, if a will be proved to have been obtained by *fraud or force,* it will be set aside in the proper court. See [*Wilby* v. *Thornhaugh, Pre. Ch.* 123.] 1 *Cha. Rep.* 24. *Herbert* v. *Lownes,* 8 *Vin. Abr.* 165. *Goss* v. *Tracy,* 1 *P. Wms.* 287. [2 *Vern.* 699. Thus though persuasion may be employed to influence the dispositions in a will, that does not amount to the idea of influence; and whether or not a capricious partiality has been shewn, the court will not inquire; but where persuasion is used to a testator

9. *T.* 1725. *Stephenson* and *Gardiner.* A bill was brought to set aside a will relating to a personal estate only, and to stay the probate thereof, setting forth that the will was gained by

Persons circumvented by fraud. (I)

on his death-bed, when even a word distracts him, it may amount to force and inspiring fear. *Per* Sir *W. Wynne* in *Dickinson* v. *Moss, Prerog. Trin. T.* 1790. *MSS. Cas.* 85. For although a man may have a mind of sufficient soundness and discretion to regulate his affairs in general, yet if such a dominion or influence be obtained over him as to prevent his exercising that discretion in the making his will, he cannot be considered as having such a "disposing mind" as will give effect to the will. *Mountain* v. *Bennett, E.* 1787, 1 *Cox*, 353.; Tr. at bar in Exch. on an issue of *devisavit vel non;* but the evidence to establish such a case was not determined. The will of a navy officer in favour of an agent on the advance of money, requires very clear proof of the *animus testandi:* it is not valid when executed as a mere security for debt, and was on that account annulled in *Zacharias* v. *Collis,* 3 *Phill. R.* 176. Again, where a legatee appeared to be the writer of the will as an attorney, more than ordinary proof of the authenticity of the will is called for. *Paske* v. *Ollat,* 2 *Phill. Rep.* 323.; and by the Roman law, *Qui se scripsit hæredem* could take no benefit under a will. *Dig. lib.* 34. § 8. A will made by *interrogatories* is valid; but undoubtedly wherever it is so made the court will be more on its guard against importunity, more jealous of capacity, and more strict in requiring proof of spontaneity and volition, than in an ordinary case: but if there is clear capacity of the *animus testandi,* and if the intention is or may be reduced into writing, the will is valid. *Green* v. *Skipworth and others,* 1 *Phill. Rep.* 53. In *Billinghurst* v. *Vichers,* formerly *Leonard,* 1 *Phill. Rep.* 187. Part of a will was established, and part held not to be entitled to probate, as being written by executor, and no sufficient proof of testator's assent given; but, on the contrary, his silent signature and active agency of the executor and residuary legatee were shewn. Courts of equity cannot set aside a will for fraud; for a will of personalty may be set aside for fraud in the spiritual court, and a will of real estate at law. *Webb* v. *Claverden,* 2 *Atk.* 424. *Anon.* 3 *Atk.* 17.; and see *Bennet* v. *Vade,* 2 *Atk.* 324. *James* v. *Greaves,* 2 *P. Wms.* 270. Nor will equity restrain probate in the proper court; but if fraud be proved, it will not assist the party practising it, but leave him to make what he can of it. *Nelson* v. *Oldfield,* 2 *Vern.* 76. see *infra,* 238. *note.* But if the validity of the will *has* been already determined and acted on, equity will restrain proceedings in the prerogative court to controvert its validity. *Sheffield* v. *D. of Buckingham,* 1 *Atk.* 628. And where legacies were procured by fraud, equity has declared the party who has practised the fraud a trustee for the party prejudiced by it. *Herbert* v. *Lownes,* 1 *Ch. R.* 13.; and other cases cited 1 *Fonbl. Treat. on Equity,* 2d *ed.* 69. *n.*] *Error* may also in some cases affect a will, especially if it appear that the testator was solely actuated by an almost insuperable mistake, which has made him neglect the performance of some urgent duty; for the presumption is, that had he not been led into an error, he could not thus have willed. And this is the case mentioned by *Cicero* in his treatise *de Oratore, lib.* 1. c. 38., and quoted by *Grotius de J. B. & P.* 2. 9. 6., and by lord *Mans-*

fraud, and by misrepresenting the plaintiffs, who were the half brothers and sisters of the testatrix; and alleging, that the will was falsely read to her; and setting forth divers instances of fraud, on the part of the defendants, in procuring this will. The defendants, as to that part of the bill which sought to set aside the will, and to stay the proceeding, demurred to the jurisdiction of the court: forasmuch as upon the face of the bill it appeared, that the plaintiffs were improper to sue here, in regard the spiritual court had the proper cognizance of wills relating to personal estates, and could determine fraud concerning them. After which, motions were made before the lords commissioners and the lord chancellor King for an injunction. But the court was against it: for the spiritual court hath jurisdiction of fraud relating to a will of a personal estate, and can examine the parties by allegation touching this fraud; and if the will was falsely read to the testatrix, then it is not her will. *2 P. Will.* 286. (6)

T. 1686. *Archer* and *Mosse.* The testator, when in perfect health, had made his will, and thereby gave to the plaintiff Archer, his nephew, the greatest part of his personal estate, to the value of 5000*l.* But one Bridget Sandyman, his maid-servant, had in his sickness prevailed upon him to make another will, and

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field in *Brady* v. *Cubitt*, *2 Doug. Rep.* 39. "What cause," says *Cicero*, "could be of greater moment than that of the soldier, whose death being announced at home by a false messenger from the army, the father believing the report, altered his will, appointed another person his heir, and died?" The affair was brought before the centumvirs when the soldier returned home, and sued for his paternal inheritances, as a son passed over in his father's will; namely, the question of civil law in that cause was, "Can a son be disinherited of his paternal goods, whom his father has neither appointed heir by his testament nor disinherited by name?" The last reason mentioned by the author would have been sufficient to annul the will as *testamentum inofficiosum*, by the civil law; but the *error* which induced the father to alter his will, seems also to be relied on by Cicero, and it is in this view of the case that the passage is quoted by the two latter great authorities. It must however be very difficult to establish by evidence, except in a case equally strong with that here put, that any alleged error, false rumour, or misrepresentation operated so irresistibly on the mind of a testator as to be the sole efficient cause that induced him to make or to alter his will in a particular manner. And perhaps such a presumption would not be sustained, except in a case where the error was equally unavoidable, and the intention of the testator equally apparent, as well as his duty equally urgent, with those of the father above mentioned. See *Bodmin* v. *Roberts*, *3 Ch. Ca.* 61.; and *James* v. *Greaves*, *2 P. Wms.* 270. [*Bennet* v. *Vade*, *2 Atk.* 243. *Webb* v. *Claverden*, *ib.* 424. *Anon.* 3 *Atk.* 17.

In *Napier's* case, 1 *Phill. Rep.* 83. Probate of the will of an officer, supposed to be killed in the battle of Corunna in 1809, was revoked, and the will re-delivered to him on his personal appearance before the judge.]

(6) See *Plume* v. *Beale*, 1 *P. W.* 389.

to marry her a week before his death, when he lay in his sick bed, at six of the clock at night, though it was really proved by two ministers, that she was a year before actually married to the defendant *Mosse*, and was then his wife, and that *Mosse* procured the licence for the marriage of the testator to *Bridget*; and this will being set up by *Mosse* (executor to *Bridget*), though it appeared that there was as gross a practice as could be in the gaining the will, the testator being *non compos mentis*, both at the time of making the will, and also at the time of the supposed marriage, and that in his health he knew that *Mosse* and *Bridget* were married, and that *Bridget* suppressed the first will; yet that will so set up, being proved in the prerogative court, and the [60] matter in question relating only to a personal estate, the lord chancellor was of opinion, that, whilst the probate stood, the matter was not examinable in chancery; and though the fraud was fully proved and opened to him, he would not hear any proofs read, but dismissed the bill. 2 *Vern.* 8. (*u*)

But though a will gained by fraud, and proved in the spiritual court, is not to be controverted in equity; yet if the party claiming under such a will comes for equity in the court of chancery, he shall not have it. 2 *Vern.* 76.

M. 1715. *Gosse* and *Tracy*. It being urged, that a will concerning *land* is only triable at common law, and that the party there may take advantage of any fraud or imposition on the testator, and therefore not proper to be examined into or set aside in equity upon pretence of fraud or surprise; the lord chancellor held, that there might be fraud in obtaining a will that might be relievable in equity, and of which no advantage could be taken at law; as if a man agree to give the testator 2000*l.* in bank bills, if he will devise his estate to him, and on the delivery of such bills makes his will, and deviseth his estate unto him, and the bills prove to be forged or counterfeited. 2 *Vern.* 700.

But in the case of *Bransby* and *Kerridge*, July 28. 1728, in the house of lords, it was decreed, that a will of a real estate could not be set aside in a court of equity for fraud or imposition, but must be tried at law on *devisavit vel non*, being a matter proper for a jury to inquire into. *Law of Test.* 60. *Vin. Devise*, Z. 2.

Persons deaf and dumb.

10. Those who are deaf and dumb by nature, cannot make any kind of testament or last will; unless it do appear by sufficient arguments, that such person understandeth what a testament meaneth, and that he hath a desire to make a testament: for if he have such understanding and desire, then he may by signs and tokens declare his testament. *Swin.* 95.

Blind.

11. Dr. *Ayliffe* says, generally, that persons who are blind cannot make their wills. *Ayl. Par.* 531.

But Dr. *Swinburne* says, he that is blind may make a nuncu-

(*u*) *Vid. infra, Probate*, 7. & 23.

pative testament, by declaring his will before a sufficient number of witnesses. And he may make his testament in writing, provided the same be read before witnesses, and in their presence [61] acknowledged by the testator for his last will. But if a writing were delivered to the testator, and he, not hearing the same read, acknowledged the same for his will, this would not be sufficient; for it may be that if he should hear the same read, he would not acknowledge the same for his will. *Swin.* 96.

And it seemeth best, that it be read over to the testator, and approved by him, in the presence of all the subscribing witnesses; and this the civil law did expressly require in the case of a blind man's will: But in England this strictness seemeth not to be precisely requisite, if there shall be otherwise satisfactory proof before the court that the identical will was read over to him, although it was not in their presence. (7) And sometimes the single oath of the writer hath been allowed sufficient by the court of delegates, to prove the identity of the will.

And what precautions are necessary for authenticating a blind man's will, seem in like degree requisite in the case of a person who cannot read. For though the law in other cases may presume, that the person who executes a will knows and approves of the contents thereof; yet that presumption ceaseth, where by defect of education he cannot read, or by sickness he is incapacitated to read the will at that time.

Traitor.

12. Whosoever is lawfully convicted of high treason, by verdict, confession, outlawry, or presentment; besides the loss of his life, shall forfeit to the king all his goods and chattels, and all such lands, tenements, and hereditaments, as he shall have in his own right, use, or possession, of any estate or inheritance, at the time of such treason committed, or at any time after; and so consequently is intestable. Insomuch that traitors are not only deprived of making any testament, or other kind of last will, from the time of their conviction; but also the testament before made doth by reason of the same conviction become void, both in respect of goods, and also in respect of lands, tenements, and hereditaments. *Swin.* 97.

But if any person, being attainted of treason, obtain the king's pardon, and be thereby restored to his former estate; then may he make his testament, as if he had not been convicted: or if he make any before his conviction and condemnation, the same by reason of such pardon recovereth its former force and effect. *Swin.* 97.

But if a traitor hath goods, as executor to another, the same are not forfeited: whence it follows, that of such goods he may make his will. *Swin.* 97.

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(7) And this was held in the instance of a will of lands in *Longchamp,* d. *Goodfellow,* v. *Fish,* 2 *N. R.* 415.

13. If any person be condemned of felony, he ought to suffer death, and the king shall have all his goods, wheresoever they be found. And if he have any freehold, it shall forthwith be seized into the king's hands, and he shall have the profit thereof by the space of a year and a day, and also waste; and after the king hath had the year, day, and waste, the land shall be restored to the chief lord of the fee. Felons therefore, lawfully convicted, cannot make any testaments, or other dispositions, of any goods or lands; because the law hath disposed thereof already. *Swin.* 98. Felon.

But a pardon restoreth them to their former estate. *Swin.* 98.

14. If a man do willingly kill himself, his testament, (if he made any,) is void, both concerning the appointment of the executor, and also concerning the legacy or bequest of any goods; for they are confiscate. *Swin.* 106. Felo de se.

But if the testament be of lands, it seemeth it is not void; because a *felo de se* doth not forfeit any lands of inheritance, for no man can forfeit his lands without an attainder by course of law. 3 *Inst.* 55.

15. An outlawed person is not only out of the king's protection, and out of the aid of law, but also all his goods and chattels are forfeited to the king by means of the outlawry, although he were outlawed but in an action personal; and although the action were not just, nevertheless his goods and chattels are forfeited, by reason of his contempt in not appearing: and therefore he that is outlawed cannot make his testament of his goods so forfeited. *Swin.* 107. Outlaw.

Howbeit, it seemeth, that he who is outlawed in an action personal, may make his testament of his lands; for they are not forfeited. *Swin.* 107.

Also a man outlawed in a personal action may in some case make executors; for he may have debts upon contract which are not forfeited to the king: and those executors may have a writ of error to reverse the outlawry. *Cro. El.* 851.

16. It seemeth to be the better opinion, that an excommunicate person may make a testament; unless he be excommunicate with that great curse, which is called anathema, which is not to be inflicted but upon great cause, with great deliberation and solemnity. *Swin.* 10. Excommunicate.

And in this case (of the greater excommunication, as it seemeth) lord *Coke* observes, that an excommunication is a greater disability than an outlawry; for if a plaintiff, who is an executor, be outlawed, his outlawry cannot be pleaded to disable him from proceeding in the suit, because it is in the right of another; but if he is excommunicate it is otherwise, because every man that converseth with such a person is excommunicated himself. 1 *Inst.* 134. That is, after he is denounced excom- [63]

municate, and they are admonished not to converse with him. *Ayl. Par.* 266.

II. *Of what things a will may be made.*

Lands. (8) 1. Lord *Coke* says, at the common law (by which he must be understood to signify the common law since the conquest) no lands or tenements were devisable by any last will and testament, nor ought to be transferred from one to another, but by solemn livery of seisin, matter of record, or sufficient writing; but by certain customs in some boroughs they were devisable. 1 *Inst.* 111. (*x*)

But although lands might not be disposed by will, yet a device was found out, and a distinction made between the land and the use and profits of the land, whereby feoffments to uses came in practice; by virtue whereof a person might dispose of the profits, though he could not dispose of the land itself. *Wright's Tenures,* 172.

And the way was this: They conveyed their full estates of their lands to friends in trust, properly called feoffees in trust; and then they would by their wills declare, how their friends should dispose of their lands; and if those friends would not perform it, the court of chancery was to compel them by reason of trust; and this trust was called the use of the land, so as the feoffees had the land, and the party himself had the use; which use was in equity to take the profits for himself, and that the feoffees should make such an estate as he should appoint them; and if he appointed none, then the use should go to the heir, as the estate itself of the land should have done; for the use was to the estate, like a shadow following the body. *Lord Bacon's Use of the Law,* 152.

[64] But by this course of putting lands into use, there were many inconveniences; as, namely, a man that had cause to sue for his land knew not against whom to bring his action, nor who was owner of it; the wife was defrauded of her thirds; the husband of being tenant by curtesy; the lord of his wardship, relief, heriot, and escheat; the creditor of his extent for debt; the tenant of his lease: for these rights and duties by the law were due from him that was owner of the land, and none other, which was now the feoffee of trust; and so the old owner, which we call the feoffor, should take the profits, and leave the power to dispose of the land at his discretion to the feoffee; and yet he

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(8) As to what words will pass real property, see *infra,* 137. *notis.*

(*x*) This principle of the common law may perhaps be traced to the manners of the ancient Germans, of whom Tacitus observes: *Heredes successoresque sui cuique liberi. Nullum testamentum; si liberi non sunt, proximus gradus in successione fratres, patrui, avunculi.* De *Morib. Germ. c.* 20.

was not such a tenant as to be seised of the land, so as his wife could have dower, or the lands be extended for his debts, or that he could forfeit it for felony or treason, or that his heir could be ward for it, or any duty of tenure fall to the lord by his death, or that he could make any leases of it. *Bac.* 153.

Which frauds, by degrees of time as they increased, were remedied by divers statutes; as, namely, by a statute of the 1 *H.* 6. and by another of the 4 *H.* 8. it was appointed, that the action may be tried against him which taketh the profits, which was the *cestuy que use;* by a statute made in the 1 *R.* 3. leases and estates made by *cestuy que use* are made good, and estates by him acknowledged; by a statute in the 4 *H.* 7. the heir of *cestuy que use* was to be in ward; and by a statute in the 16 *H.* 8. the lord was to have relief upon the death of any *cestuy que use*. *Bac.* 153.

Which frauds nevertheless multiplying daily, in the end, in the 27th year of king *Hen.* 8. the parliament purposing to take away all those uses, and to reduce the law to the ancient form of conveying of lands by public livery of seisin, fine and recovery, did ordain, that where lands were put in trust or use, there the possession and estate should be presently carried out of the friends in trust, and settled and invested on him that had the uses, for such term and time as he had the use. *Bac.* 153, 154.

And by this statute of the 27 *H.* 8. the power of disposing land by will is clearly taken away amongst those frauds: whereupon in the 32 *H.* 8. another statute was made, by which it is enacted, that every person having any manors, lands, tenements, or hereditaments, holden in soccage, or of the nature of soccage tenure, *shall have full* and free *liberty, power, and authority, to give, dispose, will, and devise*, as well by his last will and testament in writing, as otherwise by any act or acts lawfully executed in [65] his life, all his said manors, lands, tenements, or hereditaments, or any of them, at his free will and pleasure.

And in the same statute there are several restrictions and limitations with regard to the devising of lands holden by knights' service; which were further explained by the statute of the 34 & 35 *H.* 8. *c.* 5.

And finally, by the statute of the 12 *C.* 2. *c.* 25. tenures by knights' service were abolished, and all tenures turned into free and common soccage.

[Copyhold lands.]

So that now a man may by his will dispose of his whole landed property, except his copyhold and other customary lands, which are devisable or not, according to the custom of the respective manors. And generally, a devise of copyhold will not pass, without a surrender to the use of the will.

But in case of a *child*, or *widow*, it is otherwise; for a court of equity, in favour of these, will supply the defect of surrender. 2 *Vesey*, 582. 5 *Ves.* 557.

So also where there is a general devise of real estate to pay *debts*, and there is no real estate but copyhold, the court will supply the defect of surrender for the benefit of creditors. *Id.*

Also, where a copyhold is in the hands of *trustees*, the person for whom the lands are holden in trust may devise the same without surrender; because, the legal estate being not in him, but in the trustees, he cannot surrender. 2 *Atk.* 38. 1 *Ves.* 489.

And although the court will supply the defect of a surrender for the benefit of children, yet the rule doth not extend to *grand-children*, or to a *natural child*, and consequently not to any more distant kindred. 2 *Ves.* 582. 1 *Wilson*, 161. 6 *Ves.* 544. (*x*)

And where a man seised of copyhold lands, surrenders the same to the use of his will, and executes a will, although it is not attested by any witnesses, yet it shall direct the uses of the surrender; for the clause in the statute which requires the testator's signing in the presence of three witnesses, is confined only to such estates as pass by the statute of wills of the 34 & 35 *H.* 8. which doth not extend to copyhold. 2 *Atkyns*, 37. *Doe*, d. *Cook*, v. *Danvers*, 7 *East's R.* 299.

[But now by *stat.* 55 *Geo.* 3. *c.* 192. intituled " An act to re- " move certain difficulties in the disposition of copyhold estates " by will," after reciting, That whereas by the customs of certain manors, copyhold estates of such manors pass by the last will and testament of the copyhold tenants thereof, declaring the uses of surrenders made for that purpose: And whereas much inconvenience has arisen from the necessity of making such surrenders; *it is enacted*, That in all cases where by the custom of any manor in *England* or *Ireland* any copyhold tenant of such manor may by his or her last will or testament dispose of or appoint his or her copyhold tenements, the same having been surrendered to such uses as shall be by such will declared, every disposition or charge of any such copyholds, or of any right or title to the same, made by any such will, by any person who shall die after the passing of this act (viz. 12th *July*, 1815 (9),) *shall be as effectual, although no surrender is made to the use of such will, as it would have been had such surrender been so made.* § 1. By § 2. no person entitled or claiming to be entitled to copyhold lands, tenements, or hereditaments, in consequence of any testa-

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(*x*) [See also *Lindopp* v. *Eboral*, 3 *Bro. C. C.* 188. *Kidney* v. *Coussmaker*, 12 *Ves. R.* 136. Where a] testator devised "all the rest, residue, and remainder of his real and personal estate to his nephews and nieces:" it was held not sufficient for supplying the want of a surrender of copyhold land, contiguous and intermixed with the freehold, against the heir. [*Judd* v. *Pratt*, *M.* 1806. 13 *Ves.* 168. affirmed 15 *Ves.* 390. *M.* 1808. *Byas* v. *Byas*, 2 *Ves. R.* 164. *Church* v. *Mundy*, 12 *Ves.* 426.]

(9) Before this act, a devise of copyhold estate, by description of copyhold ground rent, was good. *Walker* v. *Shore*, *E.* 1815. 19 *Ves.* 387.

mentary dispositions, shall be entitled to be admitted thereto under this act, except on payment of all such stamp duties, fees, and sums of money, as would have been lawfully payable in respect of the surrender thereof to the use of such will, or in respect of the presenting, registering, or enrolling such surrender, had the lands, &c. been surrendered to the use of the will of the person so disposing thereof: all such stamp duties, fees, &c. to be paid in addition to the stamp duties, fees, or sums of money due or payable on the admission to the same; and the stamp duties to be affixed to the copy of the admission. § 3. Enacts, that nothing herein shall render ineffectual any devise or disposition of any copyhold lands, tenements, or hereditaments, or of any right, title, or interest in or to the same, which would be valid had this act not been made, or to render effectual any devise, &c. of any copyhold lands, &c., or of any right, &c. to or in the same, which would be ineffectual if a surrender had been made to the use of the will of the person attempting to dispose thereof by will.

Copyhold will not pass by general description where there is a freehold to satisfy the words of the devise, even though testator had supposed it to be a freehold, and the first devise was for payment of debts, and then given to a younger child otherwise provided for (1), but under a devise of "*all my real property*," copyhold passes. (2) [66]

[Encumbered lands.] [Where lands encumbered are devised, *vid. post. Payment of legacies*, 10. *in note*.] (*y*)

Lands to charitable uses. 2. By the 9 *Geo.* 2. *c.* 36. No manors, lands, tenements, rents, advowsons, or other hereditaments, corporeal or incorporeal, whatsoever, nor any sum or sums of money, goods, chattels, stocks in the public funds, securities for money, or any other personal estate whatsoever, to be laid out or disposed of in the purchase of any lands, tenements, or hereditaments, shall be given or appointed *by will*, to any person or persons, bodies politic or corporate, or otherwise, for any estate or interest whatsoever, in trust or for the benefit of any charitable uses; but the same shall be done *by deed indented, twelve months at least before the death of the donor, to be inrolled within six months after the execution in the high court of chancery;* and the same to take effect immediately after the execution for the charitable use intended. (*z*)

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(1) *Lindopp* v. *Eboral, M.* 1790. 3 *Bro. C. C.* 188.

(2) *Nicholls* v. *Butcher, M.* 1810. 18 *Ves.* 193.; and see *Doe,* d. *Cook,* v. *Danvers,* 7 *East,* 299. See *infra,* p. 77. *n.*

(*y*) A man may also devise a mere possibility, when coupled with an interest, or executory devise. *Jones* v. *Roe in error,* 3 *T. Rep.* 88. For the nature of which, *vid. infra,* 5. *and* 23. Also lands articled to be bought before possession. *Greenhill* v. *Greenhill,* [1 *Eq. Ab.* 174.] 2 *Vern.* 679. 3 *P. Wms.* 169. As to what words will pass a fee simple, or an estate for life, *vid. infra, Form and manner,* 13.

(*z*) See Mortmain.

Estate *pur auter vie.*

3. By the statute of the 29 *Car.* 2. *c.* 3. Any estate *pur auter vie* shall be devisable by a will in writing signed by the party so devising the same, or by some other person in his presence and by his express directions, attested and subscribed in the presence of the devisor by three or more witnesses; and if no such devise thereof be made, the same shall be chargeable in the hands of the heir, if it shall come to him by reason of a special occupancy, as assets by descent; as in case of lands in fee simple: and in case there be no *special occupant* thereof, it shall go to the executors or administrators of the party that had the estate thereof by virtue of the grant, and shall be assets in their hands. § 12.

Pur auter vie.] That is, being held by lease during the life of another person. (*a*)

(*a*) These estates are freehold interests, but they are not entailable within the statute *de donis*, and therefore no common recovery can be suffered of them; but the person who would have been tenant in tail, had the estate been an inheritance, is entitled to the absolute ownership, and may defeat the remainders, by some act *inter vivos*, or, as it would seem, by his will alone. See *Doe*, dem. *Blake*, v. *Luxton*, 6 *T. R.* 289. *Grey* v. *Mannock*, *ib.* and *Blake* v. *Blake*, 3 *P. Wms.* 10. *in note.* These estates are frequently devised for life, with remainder over, in which case Ld. *Hardwicke* has observed, that the intent of the testator always is, that the leases shall be renewed. *Verney* v. *Verney*, 1 *Ves.* 430. But by Ld. *Thurlow* C. Where an estate of limited duration is given to one for life, the intent is to give him whatever it shall produce during his life: and in that case, unless there are strong expressions to shew a (contrary) intention, the court cannot compel him to renew. *Stone* v. *Theed*, 2 *Bro. C. C.* 243. But if he renews, he shall not renew for his own use alone, but shall be a trustee for the remainder-man, who on his part shall contribute towards the expence of the renewal. And the question has been, In what proportion? Where both parties taking were alive, the tenant for life has usually been directed to pay one-third, and the remainder-man the other two-thirds. But this rule appears to have been disapproved of by Ld. *Macclesfield* and by Ld. *Thurlow*, and seems ill calculated to make the sums contributed in every instance proportionable to the benefit acquired. Where the tenant for life has renewed, and dies, the time he has actually enjoyed the estate may be considered in settling the proportion between his representatives and the remainder-man. Thus lands in mortgage being devised to *A* for life, remainder to *B* and his heirs, *A* entered and bought up the mortgage, taking an assignment in trustees' names, and died. *B*, the remainder-man, preferred his bill against the defendant, the representative of *A*, to redeem the mortgage; and his counsel insisted that he ought to pay but two-thirds of what was due on the mortgage, and the other third ought to be allowed by the defendant, by reason that the tenant for life enjoyed the profits during his life: but the court said, that if the remainder-man had come to redeem in the lifetime of the tenant for life, then he should have allowed a proportion of the money with respect to the value of the respective estates of the tenant for life and remainder-man; but he being now

Special occupant. A special occupant is, where an estate for life is made to a man and his heirs; in such case, the heir shall have the estate, after the decease of his ancestor, as *special occupant*, or as a person particularly described, to whom the estate shall go after the lessee's death. (*b*) [By 14 *G.* 2. *c.* 20. § 9. such estates *pur auter vie*, in case there is no special occupant thereof, of which no devise has been made according to 29 *Car.* 2. *c.* 3. §§ 5, 6. or so much thereof as have not been so devised, shall be distributed as the personal estate of the testator or intestate. (3)] [68]

4. One that hath money to be paid to him on a mortgage, may devise this money when it comes. *God. O. L.* 391. [And see *Patch's Treatise on Mortgages*, 141.] Mortgagee.

And if the feoffee in mortgage, before the day of payment which should be made to him, maketh his executors, and die, and his heir entereth into the land as he ought; it seemeth in this case, that the feoffor ought to pay the money at the day appointed to the executors, and not to the heir of the feoffee: but yet the words of the condition may be such, as the payment shall be made to the heir; as if the condition were, that if the feoffor pay to the feoffee or to his *heirs* such a sum at such a day, there after the death of the feoffee, if he dieth before the day limited, the payment ought to be made to the heir at the day appointed. 1 *Inst.* 209, 210.

And hereby it appeareth, that the executors do more represent the person of the testator, than the heir doth that of the ancestor; for though the executor be not named, yet the law appoints him to receive the money, but so doth not the law appoint the heir to receive the money unless he be named. 1 *Inst.* 209, 210.

5. A person may devise by his will the right of presenting to the next avoidance, or the inheritance of an advowson. And if such devise be made by the incumbent of the church, the Advowson.

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dead, and having enjoyed the estate but one year only, the defendant must make an allowance only for the time that *A* enjoyed the estate. *Clyat* v. *Batteson*, 1 *Vern.* 404. Where leases renewable, and directed by the will to be renewed, were given, together with the rest of the personal estate, as a general fund charged with annuities, &c. to trustees, to pay the rents and profits to *A* for life, remainder to *B*: Ld. *Thurlow* C. held, that the expence of renewal was not to be apportioned between the tenant for life and remainder-man, but to be paid out of the profits of the estate in the first instance. *Stone* v. *Theed*, 2 *Bro. C. C.* 243. As to the rule laid down by his lordship for the renewal of terms, see *infra*, 7. And that estates *pur auter vie* are to be put into the inventory. *Vid. infra*, *Inventory*, 8.

(*b*) The interest in an estate *pur auter vie*, granted to a man, *his executors, administrators, and assigns*, belongs to those who are intitled to the personal estate. *Ripley* v. *Waterworth*, 7 *Ves.* 425. 442.

(3) See an instance of special occupancy taking place, *Sheffield*, Bt. v. Ld. *Mulgrave*, 5 *T. R.* 571.

inheritance of the advowson being in him, it is good, though he die incumbent; for though the testament hath no effect but by the death of the testator, yet it hath an inception in his lifetime: and so it is, though he appoint by his will who shall be presented by the executors, or that one executor shall present the other, or doth devise that his executors shall grant the advowson to such a man. *Wats. c.* 10. (*c*)

[69] **Lands contracted for, but not conveyed.** 6. If upon articles for a purchase, the purchaser die, having devised the land before a conveyance executed, the land will pass in equity; for the testator had an equity to recover the land, and the vendor stood trustee for the testator, and as he should appoint, till a conveyance executed. 1 *Chan. Cas.* 39. 2 *Vern.* 679.

For the vendor of the estate is, from the time of his contract, considered as a trustee for the purchaser; and the vendee, as to the money, is considered as a trustee for the vendor. 1 *Atkyns*, 573.

So if a man covenants to lay out a sum of money in the purchase of lands, generally, and deviseth his real estate before he hath made such a purchase: the money to be laid out will pass to the devisee. *Id.*

But if a man, having made his will, afterwards contracts for the purchase of lands, the lands contracted for will not pass by the will, but descend to the heir at law. *Id.*

But if a good title cannot be made of the lands, as the heir in such case cannot have the lands, so he shall not have the money intended to be laid out. *Id.*

Lease [for life or lives.] 7. If a man have a lease for never so many years, determinable upon life or lives, that is, if such or such live so long; this estate may well enough be given and disposed by will, because it is but a chattel. *Went.* 19. (*d*)

(*c*) But where an advowson was devised *to the first or other son of* B, *that should be bred a clergyman, and be in holy orders, and if* B *should have no such son, to* C; both devises were holden by the court of C. P. to be void, as depending on too remote a contingency; for the rule of law is, that the contingency on which such an executory devise hinges *must take effect* within some life in being, or 21 years afterwards; but it was uncertain that the son of *B*, if he ever should have any, would take, or be able to take orders within 21 years of the death of his father. *Proctor* v. *the Bishop of Bath and Wells, and others*, 2 *H. Bla.* 358. Vid. infra, *Form and manner*, 23.

(*d*) A *lease for years* may also be devised to *A* for life, remainder to *B*. And if the lease be renewable, and *A* renew, *B* shall contribute to the fine so partaking of the benefit of the renewal. *A* was tenant for life of a lease for years, the remainder of which was limited to *B*. *A* renewed for 28 years, when 12 years of the old lease was yet to come, and enjoyed it 9 of the 28. Per Ld. *Thurlow* C. The master ought to take the sum paid by her for the renewal of

8. Mr. *Wentworth* says, If one having a lease for many years, as an hundred, five hundred, more or less, doth devise and bequeath the same to *A* and the heirs male of his body, and for want of such issue to *B* and the heirs male of his body; and *A* dieth, having issue a son; the term shall not go to his son, but to his executor or administrator: for it cannot be made a matter of inheritance. So if *A* had died without issue male, the term should not have gone or remained to *B*, but to the executor or administrator of *A*. *Went.* 45. Term for years.

So if an advowson, or any other hereditament, granted or devised to one and his heirs for a hundred years; or if such a termor grant a rent out of the land to *A* and his heirs, or to the heirs, or heirs male of his body; yet shall the same go to the executor, and not to any heir: for it being derived out of a chattel, cannot be any freehold or inheritance, but is itself a mere chattel. *Went.* 54.

9. Albeit by deed of gift made in the lifetime of any person to another of all his goods and chattels, debts or things in action do not pass; yet if the testator by his last will and testament do give or bequeath to another any debt due unto him, or a thing in action belonging unto him, the legacy is good and effectual in the law, and may be recovered in this manner, that is to say, if the testator do make the legatory executor of that particular debt or thing in action bequeathed, then the legatory as executor thereof may commence suit in his own name, and recover the Debts or things in action.

the lease as the value of the term purchased, that is, of the term of 28 years to commence at the expiration of 12 years. He should then consider the value of the term of 9 years after the existing term, and what the term of 19 years after the existing term, and nine years was worth, and the latter is the proportion to be paid by the remainder-man. Then as to the kind of interest to be allowed; simple interest will not be a satisfaction, as she laid out her money totally, and the value of the lease was calculated upon the ground of compound interest; compound interest must therefore be computed upon the proportional value of the 19 years' term, to the whole expence of renewal. But as in compound interest you go upon the idea that the interest is paid upon the exact day, and immediately laid out, which is impossible, it will be sufficient to compute compound interest at 4 *per cent.* And this is only to be paid till her death, for after that her executors had the demand upon the remainder-man, and it becomes a common debt, and must carry simple interest only; and *A* having renewed a second time before the expiration of the first renewal, from which second renewal she derived no benefit, his lordship held, that her executors were entitled to the whole of the expences, at the same rate of interest; for as on the one hand the tenant for life cannot renew for his own benefit, so on the other, the remainder-man shall not have the renewal at his expence. *Nightingale* v. *Lawson*, 1 *Bro. C. C.* 440.

same to his own use, against him by whom it was due; but if the testator do not make the legatory executor of the debt or thing in action bequeathed, then his remedy lieth in the ecclesiastical court, where he may convent the executor, and compel him either to sue for that debt in a court competent, and upon [71] recovery and payment thereof to pay it over to the legatary, or else to make a letter of attorney to the legatary for the recovery of the debt or thing in action bequeathed, in the name of the executor to the use of the legatary. *Swin.* 187, 188. (*e*)

Things which the testator hath not of his own.

10. Albeit the testator have no such thing of his own as is bequeathed, yet nevertheless the legacy is good in law; therefore if the testator do bequeath a horse or a yoke of oxen, the legacy is good in law, though the testator have neither horse nor ox of his own. (*g*) But who shall make choice, in this case, of

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(*e*) At common law a *chose in action* is neither assignable nor devisable; that is, the assignee must sue as attorney, and in the name of the original creditor, and the legatee as his executor: But courts of equity will protect the assignment of a chose in action, as much as the law will that of a chose in possession. 2 *Bl. Com.* 442. [Thus a right to set aside a release for fraud is devisable. *Drew* v. *Merry*, 1 *Eq. Ab.* 175. *pl.* 7. A right of presumption given by will, whether at a price expressed or to be fixed by the trustees, shall be executed; the construction in the latter case being a reasonable price, to be ascertained by reference to the master: but to pass such a right to the heir or devisee, the intention to accept the offer must appear by some act, or at least by will. In this case, the will directed, "that *A*, or whoever shall after the testator's decease be "entitled to estates in settlement, may have the refusal." *A* having died without shewing such intention, and a tenant for life of part of the settled estates, not by the settlement, but under a recovery by *A*, not answering the description, it was held that the right did not then exist in any one. *Earl of Radnor* v. *Shafto*, *T.* 1805. 11 *Ves.* 448.] And when the executor has received debts owing to the testator, he may be compelled to deliver them to the legatee in court of conscience or in the spiritual court. *Off. of Exec.* 18. *Ab. Eq. Ca.* 175. If a debtor bequeath to his creditors the same or a larger sum than his debt, the rule of law is, that it shall be construed a satisfaction: but otherwise if he order his debts and legacies to be paid, or it appear by the will that he meant to be both just and generous; for the rule is taken strictly. *Richardson* v. *Greese*, 3 *Atk.* 65. *Chancey's* case, 1 *P. Wms.* 408. *Vid. infra*, [362 *n.*] *Form and manner*, 6. And as to a presumed satisfaction of a debt by a legacy, there is no distinction between the case of a parent and child and that of strangers. *Tolson* v. *Collins*, 4 *Ves.* 483.

(*g*) This doctrine is borrowed from the civil law, which permits a testator to will away not only his own property but that of his heir or a stranger, so that his heir or representative shall be compelled to purchase the thing willed, whatever its price may be; or if the owner will not part with it, to pay the value of it, ascer-

the thing so bequeathed, is a question not to be neglected: and the solution is this; that if the words of the devise be directed to the legatary, as if the testator shall thus say, I will that *A B* shall have a horse, the choice doth belong to the legatary; but if the words be directed to the executor, as if the testator shall thus say; I will that my executor give to *A B* a horse, the election doth belong to the executor. Provided nevertheless, that to whomsoever the election doth belong, whether to the legatary, or to the executor, they must not be unreasonable in their election, but frame themselves according to the meaning of the testator; otherwise the legatary might make choice of the best horse in [72] the country, and the executor of the worst, contrary to the meaning of the deceased. *Swin.* 188.

Things in joint tenancy.

11. If there be two joint tenants of *lands*, and one of them deviseth that which to him belongs, and dieth; this is no good devise, and the devisee takes nothing, because the devise doth not take effect until after the death of the devisor, and then the surviving joint tenant takes the whole by prior title, to wit, from the first feoffment. *Gilbert on Wills*, 120.

And although the jointure is severed before the testator's death, yet if the will be made before the severance, it will have no effect, unless there is a republication of the will after the partition. *Swift* v. *Roberts*, 3 *Burr. R.* 1496.

So also a man cannot give or bequeath by will any of those *goods* or chattels which he hath jointly with another; for if he should bequeath his portion thereof to a third person, this bequest is void by the laws of this realm; and the survivor, which had those goods or chattels jointly with another, shall have that portion so bequeathed, notwithstanding the said will. *Swin.* 189.(*h*)

[Things in common.]

But otherwise it is with the tenants in common (*God. O. L.* 131.) [and coparceners. For there is no survivor between coparceners, but the part of each is descendible, and consequently may be devised. *Co. Lit.* 185. *b.* And a deed of partition is not a revocation of a devise of his moiety by tenant in common. *Luther* v. *Ridley*, [or v. *Kidby* or *Kirby*, *E.* 1730. 8 *Vin. Ab.* 148. *pl.* 30. *Swift* v. *Roberts*, 3 *Burr.* 1490. S. P.] *cited in* 3 *P. Wms.* 169 *n.*]

Corn growing.

12. By the 20 *H.* 3. *c.* 2. Widows may bequeath the crop of their ground, as well of their dowers, as other their lands and tenements; saving to the lords of the fee all such services as be due for their dowers and other tenements. And this is only in

tained by the judge. *Inst.* 2. 20. 4. For distinctions on this subject, see *Vinnius and the commentators. Ib.*

(*h*) It should appear therefore that in this case the legacy is not good, even as *legatum rei alienæ*, any more than if an heriot or heirloom be devised. *Vid. infra*, 14.

affirmance of the common law. 2 *Inst.* 80. But by the 27 *H.* 8. *c.* 10. a married woman having a jointure made, shall not have any dowry of the residue of her husband's lands.

By the 28 *H.* 8. *c.* 11. If the incumbent before his death hath caused any of his glebe land to be manured and sown, at his proper costs and charges, with any corn or grain: he may make [73] and declare his testament of all the profits of the corn growing upon the said glebe land so manured and sown. § 6.

But if the testator is lessee for years, and sow the land a short time before his lease expires, and then dies, before the corn can possibly be ripe within the term, in this case a devise thereof is void, because he himself could not have reaped it after the expiration of the term, if he had lived. *Swin.* 191.

Things not yet *in rerum natura.*

13. Not only that thing may be devised or bequeathed by the testator, which is truly extant, or hath an apparent being at the time of the making of the will or death of the testator, but that thing also which is not *in rerum natura*, whilst the testator liveth; therefore it is lawful for the testator to bequeath the corn which will be sown or grow in such soil after his death, or the lambs which shall come of his flock of sheep the next year, depasturing in such a field. But if there be no such corn growing in that soil, nor any lambs arising out of that flock, then the legacy is destitute of effect, because no such thing is extant at all, as was bequeathed. But if the testator devise a certain quantity of grain or number of lambs, as for the purpose, twenty quarters of corn or twenty lambs, and doth will and devise, that the same shall be paid out of the corn which shall grow in such a field, or arise out of his sheep depasturing in such a ground; though not so much or no corn at all there grow, or not any or not so many lambs there arise, yet nevertheless the executor is compellable by law to pay the whole legacies entirely; because the mention of the soil and of the flock was rather by way of demonstration than by way of condition, rather shewing how or by what means the said legacy might be paid, than whether it should be paid at all, yea or no. *Swin.* 186. (*i*)

Things belonging to the freehold.

14. Those things which after the death of the testator descend to the heir of the deceased, and not to his executor, cannot be devised by testament, except in such cases wherein it is lawful to devise the lands, tenements, or hereditaments. And therefore if a man seised of land in fee or fee tail, bequeath his trees growing upon the said land at the time of his death; this devise is not good, except as before: but if he devise the corn growing upon the same land at the time of his death, from the heir to some other person, this devise is good, albeit the land whereupon it groweth be not devisable. And the reason of

(*i*) *Vid. Inst.* 2. 20. 7. *cum Con. Vin.*

the difference is, because the trees are parcel of the freehold, and descend together with the land to the heir and not to the executor: but it is not so of corn; for the same shall go to the executor as parcel of the testator's goods. And therefore if a man be seised of lands in the right of his wife, and sow the land, and devise the corn growing upon the same land, and die before the corn be reaped; in this case the legatary shall have the corn, and not the wife. But it is otherwise of grass, and herbs not separated from the ground at the time of the death of the testator. If a man seised in fee in right of his wife, do let the same lands for years to a stranger, and the lessee soweth the ground, and afterwards the wife dieth, the corn not being ripe; in this case the lessee may devise the same corn, notwithstanding his estate be determined. So also of tenant by curtesy, and tenant in dower. *Swin.* 190.

And forasmuch as those things which after the death of the testator descend to the heir and not to his executor are not devisable by will, except in such cases where lands, tenements, and hereditaments be devisable; therefore those things which are affixed unto the freehold are no more devisable than the freehold itself, as the windows, doors, wainscot, and such like. *Swin.* 191. 4 *Co.* 64.

So if a man be seised of a house, and possessed of divers *heir-looms*, that by custom have gone with the house from heir to heir, and by his will deviseth away these heir-looms; this devise is void: for the will taketh effect after his death; and by his death, the heir-looms by ancient custom are vested in the heir, and the law prefers the custom before the devise. And so it is, if the lord ought to have a heriot against his tenant, and the tenant deviseth away all his goods; yet the lord shall have his heriot for the reason aforesaid. 1 *Inst.* 185.

15. The testator may devise all goods and chattels which he hath in his own right, but not those which he hath in the right of another as executor. *Swin.* 185. Things in executorship.

16. An administrator cannot make a testament of those goods which he hath as administrator to any person dying intestate; because he hath not any such goods to his own proper use, but ought therewithal to pay the debts of the dead person, and to distribute the rest according to law. *Swin.* 189. Things in administration.

[75]

17. The husband cannot devise such goods as his wife hath as being executrix to another, nor such things as are in action, Wife's goods by the husband. (4)

(4) A man may dispose of his wife's personal chattels by will as he pleases, but not of her chattels real, or *choses in action*, unless he has done some act to reduce them into his possession; for those on his death shall survive to her. But if he survives, they shall be his own to all intents. *Sharp* v. *Poole*, 4 *Rep.* 51. So it is with regard to the wife's *paraphernalia*, or debts due to her before marriage,

as debts due to her before marriage by obligation or contract, unless he and his wife recover the same during marriage, or that he renew the bonds, and take them in his own name: otherwise after his death they remain to her. 1 *Inst.* 351.

But the husband may, at any time during the coverture, release a bond given to his wife. And where the husband makes a *settlement*; the bonds to his wife, being part of her fortune, will notwithstanding his death in the lifetime of his wife, before the security be changed, be decreed in equity to his executor; he being considered in that case as a purchaser for a valuable consideration. *Cas. Temp. Talb.* 168.

Things obtained after the will made

18. A man may by his will dispose of his chattels and personal estate that he shall for the future acquire, any time after the making of his will, to the time of his death. And this is necessary, from the reason of the thing; because the chattels and personal estate are in a continual fluctuation: and if the law were not so, it would create very great confusion, or else would render it necessary for a man to make a new will every day. *Gilb.* 122. (5)

[Republication.]

But it is not so with lands, for they are fixed and permanent: and therefore if a man maketh his will, and deviseth therein all the lands which he shall have at the time of his death: and after that, he purchaseth lands, and dieth without republication or making a new will; in this case, though his intent to the contrary is very apparent, yet it is a void devise: for a man cannot devise any lands but what he hath at the time of making his will. (6) And this was adjudged upon great deliberation, by *Holt* chief justice, and the court, in the case of *Bunker and Cook*,

which were not got in during the joint lives of husband and wife. *Graham* v. *Lord Londonderry*, *M.* 1746. 3 *Atk. R.* 393.

(5) Thus, where testator bequeathed "all his drawings and pictures," it was held that pictures bought after making the will should pass. *Dean, &c. of Christchurch* v. *Barrow*, *Ambl.* 641. See 1 *P. W.* 597. 2 *Vern.* 538.

(6) Lands purchased subsequent to the making of a will do not pass by the statute of wills (see *Butler* v. *Baker*, 3 *Rep.* 30. *Lovie's* case, 10 *Rep.* 78. *Lawrence* v. *Dodwell*, 1 *Lord Raym.* 438. *Holt*, 243. *Strode* v. *Falkland*, 3 *Ch. R.* 99. *Brydges* v. *Duke of Chandos*, 2 *Ves. J.* 427.) unless the will be republished, (*Brett* v. *Rigden*, *Plowd.* 344. See p. 76. *note*, and p. 109.), or the land has been articled and contracted for before making the will, (*Prideaux* v. *Gibbon*, 2 *Cha. Cas.* 144. *Davie* v. *Beardsham*, 1 *id.* 39. *Acherley* v. *Vernon*, 9 *Mod.* 78. *Lingen* v. *Sowray*, 1 *P. Wms.* 172. *Beauclerk* v. *Mead*, 2 *P. Wms.* 169. *Pullen* v. *Ready*, *id.* 590. *Whitaker* v. *Whitaker*, 4 *Bro. C. C.* 31. &c. &c.); though by express stipulation the agreement is not to be carried into execution till a future day, which is after the making of the will. *Greenhill* v. *Greenhill*, *Pre. Ch.* 320. 2 *Vern.* 79. *Potter* v. *Potter*, 1 *Ves.* 437.

Gilb. 123. (7) and the judgment was affirmed afterwards upon a writ of error in the house of lords, *Feb.* 24. 1707.

But by *Holt* chief justice: If he republisheth his will, in such manner, and with such circumstances, as are necessary to complete execution of an original will; then the purchased lands will pass as by an original will. 11 *Mod.* 127. *Brett* v. *Rigden, Plowd.* 344. And in truth this seemeth to make it a new will, to all intents and purposes; and not a republication of [76] the old one.

But a codicil, which concerneth only personal legacies, will not amount to a republication of the will, so as to pass lands purchased after the making of the will. 2 *Vern.* 625. (8)

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(7) *Bunter* v. *Cook, Bunker* v. *Coke, Brunker* v. *Cook, Broncher* v. *Coke, M.* 1707. 11 *Mod.* 106. 121. *Fitzgib.* 225. *Salk.* 237. *Holt,* 236. 243. 246. 248. 746. S. C. Affirmed in 1 *Bro. P. C.* 199. See *Doe d. Turner* v. *Kett,* 4 *T. R.* 604. *Arthur* v. *Bokenham,* 11 *Mod.* 148. S. P. So copyhold lands purchased after a will do not pass by it, though surrendered to the use of the will. *Harris* v. *Cutler, B. R. Tr.* 10 *G.* 3. cited by Lord *Mansfield* in *Spring* v. *Biles,* 1 *T. Rep.* 435.

(8) *Strode* v. *Russell, M.* 1708. *Beckford* v. *Parnecot, Cro. El.* 493. *Aliter,* if attested by three witnesses. *Pigott* v. *Waller,* 7 *Ves.* 98. Republication should be attended with the same solemnities which are to be observed at the original publication. *Bunker* v. *Cooke, Fitzgib. R.* 225. *Dougl.* 25. Testator's saying, "his will was in a "box in his study," was held to amount to a new publication. *Cotton* v. *Cotton,* cited in *Alford* v. *Earle,* 2 *Vern. R.* 209. So where testator in a codicil recited a will, and added, "which I fully "approve of." *Rich* v. *Cockell,* 9 *Ves.* 374. (and see *infra.*) Republication of a will is tantamount to making that will *de novo;* it brings down the will to its own date, and makes it speak as it were at that time. In short, the will so republished, is to all intents and purposes a new will. *Per* Sir *J. Nicholl* in *Brown* v. *Pittis,* 1 *Add. Rep.* 38. A strong example of the effect of this doctrine is given in *Atto. Gen.* v. *Heartwell, Ambl. R.* 451.; where a codicil made *after,* to confirm a will made *before* the passing of 9 *G.* 2. *c.* 36. concerning charitable uses, brought the will within that act: and in consequence operated to avoid great part of the will. When a man republishes his will, the effect is, that the terms and words of the will should be construed to speak with regard to the property he is seised of at the date of the republication, just as if he had been possessed thereof at the time of making his will. *Heylyn* v. *Heylyn, Cowp.* 132. But though mere *republication* will pass after acquired lands to the devisees in the will, yet as it makes no alteration in its words, it follows, that where any change has taken place with respect to them, a *codicil* should be added to meet the consequences of such change: for as the devisees cannot take but under the words of the will, the intention of the testator might be otherwise frustrated: *e. g.* If A. and his heirs are devisees in a will, and A. dies in testator's lifetime, mere republication will not enable the *heirs* of A. to take under the will. (As to republication by *codicil,* see *infra,* 109.)

Republication in general.

If a man deviseth all his lands *for payment of his debts*, and purchaseth lands afterwards: the lord-keeper said he would decree a sale, though there were no precedent articles. 2 *Cha. Ca.* 144.

If a man hath a *lease*, and disposeth of it (specifically) by his will; and after surrenders it and takes a new lease, and after dies; the devisee shall not have this last lease, because this was a plain countermand of his will. *Golds.* 93. (9)

But in the case of *Stirling* and *Lydiard*, *Nov.* 21. 1744, where a man devised *all and singular his leasehold estate, goods, chattels*, and *personal estate whatsoever*, and afterwards renewed a lease; it was held by the lord chancellor *Hardwicke* clearly, that the leasehold estate passed by the will. He said the objection against its passing proceeded upon a mistake, that this is a specific legacy; but it is nothing like it: for it is only an enumeration of the several particulars of his personal estate, and is a general devise of the whole. It hath no appearance of a revocation. Suppose the testator had purchased a new lease, would not that have passed? Why then should not a new term in a lease equally pass? If I were to construe this a revocation, I do not know but if a man were to give all his bank, East India, and South Sea stock, and should afterwards turn it into money, it might as well be insisted that this was a revocation. 3 *Atk.* 199.

If a man deviseth a *term for years*, which he hath not at the time of the devise, but purchaseth some time before his death; *Holt* chief justice doubted, whether this would be good. But Mr. *Peere Williams* says, that notwithstanding the doubt in which the court of king's bench seems to have been in that case, it hath been clearly held to pass by such a will. 3 *P. Will.* 169.

[77] III. *Form and manner of making a will; and therein of appointing guardians and executors.*

[A will may be contingent, as, if the testator do not return from a journey, in which case, if he returns, it is void (1) or conditional: but such a conditional will is not converted into an absolute will, where it is shewn that the condition has been satisfied. (2)

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(9) S. P. *Abney* v. *Miller*, 2 *Atk.* 593. *Radstone* v. *Anderson*, 2 *Ves.* 418. *Marwood* v. *Turner*, 3 *P. Wms.* 163. *Hone* v. *Midcraft*, 1 *Bro. C. C.* 260. But where, after disposing of a lease by will, testator renewed it, and republished his will, it passed by the republication. *Anon. H.* 1690. 2 *Freem.* 116. See *Brett* v. *Rigden*, *Plowd.* 341. *Arthur* v. *Bockenham*, *Gilb. Dev.* 165. See *infra*, 109. note, as to republication of wills by *codicils* and *Payment of legacies*, 1. and 10. in note.

(1) *Parsons* v. *Lanoe*, *Amb.* 557.

(2) *Ingram* v. *Strong*, and *Roberts* v. *Lawrence*, 2 *Phill. Rep.* 294.

Copyholds not being within the statutes of wills and frauds, and passing by the surrender to the uses of the will, and not by the will itself, such uses may be declared by any writing which the ecclesiastical courts will grant probate of. (3)]

1. By the 29 *C.* 2. *c.* 3. intituled, *An act for prevention of frauds and perjuries*, All devises and bequests of any lands or tenements, devisable either by force of the statute of wills, or by this statute, or by force of the custom of *Kent*, or the custom of any borough, or any other particular custom, *shall be in writing* (4), and *signed by the party so devising the same*, or by some other person in his presence, and by his express directions, and shall be *attested and subscribed in the presence of the said devisor, by three or four credible witnesses;* or else they shall be utterly void, and of none effect. § 5. Of lands.

Signed] Signing being only mentioned, therefore *sealing* is not necessary, although it be expedient to a testament; which is not properly and legally a deed, to which a seal is essential, though it hath the force and virtue of a deed. *God. O. L.* 6. *Wentw.* 29.

Signed by the party so devising the same] *E.* 33 *C.* 2. *Lemain* and *Stanley*. The testator made his will, and wrote it with his own hand, and began it thus, I John Stanley make this my last will and testament; but did not subscribe his name: yet this was adjudged a good will, and sufficient signing by the testator within the statute, to pass lands; it being subscribed by three witnesses in the presence of the testator; for his name being written in the will, it must be a sufficient signing within the statute, since the statute hath not appropriated any particular place in the will, either top, bottom, or margin, for that purpose: and therefore

(3) *Tuffnell* v. *Page*, 2 *Atk.* 37. *Att. Gen.* v. *Sawtell, ib.* 497. *Same* v. *Andrews*, 1 *Ves.* 225. *Carey* v. *Askew*, 2 *Bro. C. C.* 59. And such writing not being within the statute of frauds as a will, need not be signed, unless required by the terms of the surrender to the uses of the will. *Doe d. Cook* v. *Danvers*, 7 *East. R.* 298. *Noel* v. *Hoy*, 5 *Madd. Ch. R.* 38. But after-acquired copyhold will not pass by a previous will of "all testator's lands." *Spring d. Titcher* v. *Biles*, 1 *T.R.* 435. *n.* But a will disposing of the equitable interest in a customary freehold, must be executed conformably to the statute. *Ambl.* 229. unless there is a custom for surrendering it to the use of the will. 7 *East. R.* 299. See *ante*, page 65.

(4) Thus instructions for a will taken in writing by another, in the presence, and from the oral dictation of the deceased, though without any signature or attestation, is a will *in writing* within the statute; and complies with the terms of a surrender directed to be to such uses as A. B., *in or by her last will or testament in writing, should limit*. *Doe d. Cook* v. *Danvers*, 7 *East. R.* 299. 324.

necessarily the testator is at liberty to put it where he pleases. 3 *Lev.* 1. (5)

And it hath been said, that if the devisor only put his seal to the will, without signing it, this is a sufficient signing within the statute; because signing is no more than a mark to distinguish a
[78] man's act, and sealing is a sufficient mark to know it to be his will. *Gilb.* 93.

And in *Warneford* and *Warneford*, *E.* 13 *G.* On an issue directed out of chancery, *Raymond* chief justice ruled, that sealing a will is signing within the statute. *Str.* 764. [And see *Lee* v. *Libb.* 1 *Show. R.* 68.]

But in the case of *Smith* and *Evans*, in the exchequer, Dec. 6. 1751; it was said by the lord chief baron *Parker*, baron *Clive*, and baron *Smythe* (baron *Legge* being absent), that what is said by *North*, *Windham*, and *Charleton*, in [*Lemayne* v. *Stanley*] 3 *Lev.* 1., that putting a seal to a will is sufficient signing within the statute, is very strange doctrine; for that if it were so, it would be very easy for one person to forge any man's will, by only forging the names of any two obscure persons dead; for he would have no occasion to forge the testator's hand. And the barons said, if the same thing should come in question again, they should not hold that sealing a will only was a sufficient signing within the statute. 1 *Wilson*, 313. (6)

And in the case of *Grayson* and *Atkinson*, July 17. 1752; in the chancery: Lord *Hardwicke* said, that he should have much doubted upon that point: for the statute requiring the will to be signed, undoubtedly meant some evidence to arise from the hand-writing: then how can it be said, that putting a seal to

(5) *Hilton* v. *King*, 3 *Lev.* 86. 9 *Ves. jun.* 248. In *Cook* v. *Parsons*, 1701. *Pre. Ch.* 184. 2 *Vern. R.* 459. a writing the will with testator's own hand, was held a sufficient signing within the act, though not subscribed or sealed by him. Where a will written on three sides of a sheet of paper duly attested, concluded by stating that testator had signed his name to two of the sides, and put his hand and seal to the last, and it appeared that he had put his name and seal to the last, but had omitted to sign the two first sides, it was held that the will was well executed: whatever might have been his intention at one time of signing the former sheets by his final signature, he had abandoned that intention. *Winsor* v. *Pratt*, 2 *Brod. & Bing. R.* 650. And see *infra*, 83. note.

(6) Nor (says *Willes* C. J. 1 *Ves. jun.* 13.) "do I think sealing is to be considered as signing; and I declare so now, because if that question ever comes before me, I shall not think myself precluded from weighing it thoroughly, and decreeing that it is not signing notwithstanding the *obiter dicta*, which in many cases were *nunquam dicta*, but barely the words of the reporters: for on examination I have found many of the sayings ascribed to that great man, L. C. J. *Holt*, were never said by him."

it would be a sufficient signing? For any one may put a seal; no particular evidence arises from that seal; common seals are alike, and one man's may be like another's: no certainty or guard therefore arises from thence. And where an act of parliament mentions signing, it means something different from sealing. 2 *Vesey*, 449.

H. 1728. *Dormer* and *Thurland*. The will was not signed by the testator in the presence of the witnesses; but he acknowledged it to be his hand, and declared it to be his will, in their presence; and they subscribed their names in his presence. Lord chancellor *King* inclined that the will was good: (7) but ordered the point to be reserved and made a case for further consideration. 2 *P. Will.* 506.

And in the case of *Stonehouse* and *Evelyn*, *E.* 1734, A will was held to be good, though all the witnesses did not see the testator sign it, but he owned it before them to be his hand: And the reporter says, that on his mentioning this case to Mr. Justice *Fortescue Aland*, he said, that this was the common practice: and that it is sufficient, if one of the three subscribing witnesses [79] swears that the testator acknowledged the signing to be his own hand-writing: and it is remarkable, that the statute of frauds doth not say the testator shall sign his will in the presence of three witnesses, but requires these three things; first, that the will should be in writing; secondly, that it should be signed by the testator; and thirdly, that it should be subscribed by three witnesses in the presence of the testator. 3 *P. Will.* 254.

And in the said case of *Grayson* and *Atkinson*, *July* 17. 1752; by the lord chancellor *Hardwicke:* At the time of making the act, and ever since, if a bond or deed is executed by the person who signs it, afterwards the witnesses are called in, and before those witnesses he acknowledges that to be his hand; that is al-

(7) *Grayson* v. *Atkinson*, *per* lord *Hardwicke*, 2 *Ves.* 459. *Ellis* v. *Smith*, 1 *Ves. jun.* 11. See also 17 *Ves.* 458. 18 *Ves.* 175. *Westbeach* v. *Kennedy*, 1 *Ves. & B.* 362. And it will be sufficient if testator acknowledged to each of them separately that the will is his, or that the signature is his hand-writing. And the subscribing witnesses need not express in their attestation that they subscribed their names in testator's presence: but whether they did so subscribe, is a question for a jury on the evidence before them. *Brice* v. *Smith*, *Willes*, *R.* 1. 4 *Taunt. R.* 217.

In *Ellis* v. *Smith*, 1 *Ves. jun.* 11., where there was a will subscribed by three witnesses, before whom testator declared it to be his will, but *did not sign it*, such declaration was held equivalent to a signing before them, and the will good within 29 *C* 2. *c.* 3. § 5.; and it was held also a good will of revocation within § 6.; before which provision a will might be revoked even by word of mouth. See *Trevelian's* case, *Dyer*, 143.

ways considered as an evidence of signing by the person executing, and is an attestation of it by them. It is true there is some difference between the case of a deed and a will in this respect, because signing is not necessary to a deed, but sealing is; and I do not know that it was ever held, that acknowledging his sealing without witnesses has been sufficient. But notwithstanding, that is the rule of evidence relating to signing. If it was in the case of a note, or declaration of trust, or any other instrument not requiring the solemnities of a deed, but bare signing; if that instrument is attested by witnesses, proving that they were called in, and that he took that instrument, and said, that was his hand, that would be a sufficient attestation of signing by him. That is the rule of evidence; and there is nothing in this act to take it out of the general rule. 2 *Vesey*, 457. [2 *Stra.* 1109. See *Cook* v. *Parsons*, next page. S. C.] (8)

Attested and subscribed in the presence of the said devisor] It hath been ruled in equity, that a will of lands, attested by three witnesses, who subscribed their names at the request of the testator, though at several times, is a good will, though the witnesses were never once present together. *Gilb.* 92. *Vin. Devises*, N. 10. 12.

Feb. 1. 1742. *Jones* and *Lake*. A special verdict was found upon an ejectment: the case was, the testator signed and executed his will in December 1735, in the presence of two witnesses, who attested the same in his presence; afterwards in the year 1739, he with his pen went over his name, in the presence of a third witness, who subscribed his name in the testator's presence, and at his request. And the question was, whether
[80] this was a due execution within the statute. For the heir at law it was argued, that the statute requiring three witnesses to subscribe in the testator's presence, must intend they should be all present together; otherwise there is not that degree of evidence which the statute requires: for an attestation of three witnesses at different times has only the weight of one witness. Witnesses to a will not only attest the due execution of the will, but likewise the capacity of the testator at the time of execution. A man may be sane at the time two witnesses attest, and insane when the third attests. It cannot be considered as a will, till the third witness hath signed, for that completes the act. The

(8) 2 *Stra.* 1109. S. C. And see *Cook* v. *Parsons*, note in next page. A testator desiring to make an alteration in a will, ordered a devise to be interlined. The will was then read to him; he approved it, and put his seal on the wax in presence of the same three witnesses who attested his will at first, but did not subscribe his name *de novo*. This was held a good signing, for testator's subscribing it is only with a view that the witnesses may know the deed again. *Townsend* v. *Pearce*, 1711. *Vin. Ab* tit. *Devise*, *R.* 4. 143. *pl.* 3.

will here is dated in 1735; suppose lands purchased after the date, and before the attestation by the third witness, will the lands pass? Certainly not. On the other hand, it was argued for the devisee, that a will executed before three witnesses, though at three different times, is good; the statute not requiring they should all be present at the same time. The requisites under the statute are, that the testator should sign in the presence of three witnesses at least, and that they should attest in his presence. It would therefore be adding new requisites which the act does not mention, and in effect be making a new law. ——— By the lord chief justice *Lee*: This case depends upon the words of the statute. The requisites in the statute are, that three witnesses should attest his signing, but it doth not direct that the three witnesses should be all present at the same time. Here you have the oath of three attesting witnesses. This is the degree of evidence required by the statute. And the same credit is given to three persons at different times, as at the same time. We cannot carry the requisites farther than the statute directs. The act is silent as to this particular. It would therefore be making a new requisite. The signing is the same act reiterated. The testator went over his name again, and declared it to be his last will. ——— And judgment was given against the heir at law. 2 *Atkyns*, 176. (9)

E. 31 *G.* 2. *Carleton* on the demise of *Griffin* v. *Griffin*. On a special verdict it was stated, that John Griffin, on the 2d of May 1752, wrote upon a sheet of paper with his own hand, as follows: "Know all men by these presents, that I John Griffin "make the after-mentioned my last will and testament;" and therein he made several dispositions of his real and personal estate; and subscribed it at the same time when he wrote it; but [81] there was no seal or witness to it. And on the 5th of January 1754, he wrote on the same sheet of paper, "Memorandum, "whereas I have laid out on a lighter [and so on] — all these, "at my death, shall be at my wife's disposal: And this not to

(9) And previously in *Cook* v. *Parsons*, 1701, *Pre. Ch.* 184. 2 *Vern.* 459.; where testator's will written with his own hand was published in the presence of three several witnesses at three several times, and they all attested it in his presence, *but he did not* sign it in the presence of the second witness, but only owned the signing to be his hand, and desired him to attest the will, as was proved by the witness. The lord keeper held a publication of a will before three witnesses, though at three several times, good within the statute. The same point is admitted in 2 *Ves.* 458. 1 *Ves.* jun. 14. The validity of the will, however, being a question at law, it was ordered to be tried. See the cases, *ante*, 77—79.; and *Hoil* v. *Clark*, 3 *Mod.* 218. *Longford* v. *Eyre*, 1 *P. W.* 740. Attestation by a mark is good within the statute. *Harrison* v. *Harrison*, 8 *Ves.* 185. and 504. S. P.

"disannul any of the former part made by me the 2d of May "1752. Witness my hand, John Griffin." All this latter writing related only to the personal estate; and he subscribed it in the presence of three witnesses; and then he took the said sheet of paper in his hand, and declared it to be his last will and testament, in the presence of the said three witnesses; and then delivered it to them, and desired they would attest and subscribe it in his presence, and in the presence of each other; which they accordingly did. Upon this special case, one question reserved for the opinion of the court was, Whether the republication of the said first will (made in 1752) upon the 5th of January 1754, be a publication or republication of his first will within the statute. It was argued, that this was no good will to pass lands, beyond all doubt, till the 5th of January 1754; and what happened then, was neither a publication, nor a republication sufficient to make it a good will within the statute. Here are two distinct instruments, at two different times; the first unattested, relating to the real estate; the second, signed, published, and attested according to the statute, relating to the personal. But the first was originally bad, and could not be made good by the subsequent transaction. ——— By lord *Mansfield* and the court: The case is accurately stated; for it is not stated to be either a will or a codicil, but a sheet of paper written. It is a will of an illiterate man, drawn by himself. At first, in 1752, the testator did not know that any witnesses were necessary. In 1754, he had found that they were necessary. Then he makes a subsequent disposition: Which is a memorandum to be added to it. But he doth not call this a codicil; nor doth the case state it to be so. He plainly considers the whole as one entire disposition; and he expressly declares in the latter, that he doth not thereby mean to disannul any part of his former devise or disposition. There is not a tittle in the latter that relates to the real estate; therefore the only intent of having the three witnesses, was and must be to authenticate the former. The signing the former does no harm; it makes it more solemn, but doth not hurt it. Then the publication of it [82] is, as of a will. He takes up the sheet of paper; and holding up the said sheet of paper, says, It is my will. And certainly he did not mean a part of it only, but the whole of it. And he desires them to attest it. All this must relate to the whole that was written on this paper. It must be considered as one intire will, made at different times, and attested, agreeable to the statute. And a man is not obliged to make his whole will all at the same time. 1 *Bur. R.* 549.

In the presence of the said devisor] *E.* 3 *Ja.* 2. *Shires* and *Glascock*. The question was, Whether the will was made according to the statute; for the testator had desired the witnesses to go into another room, seven yards distant, to attest it, in which

there was a window broken, through which the testator might see them. By the court: The statute requireth attesting in his presence, to prevent obtruding another will in the place of the true one: it is enough if the testator might see, it is not necessary that he should actually see them signing; for at that rate if a man should but turn his back or look off, it would vitiate the will. Here the signing was in the view of the testator; he might have seen it, and that it is enough. So if the testator being sick, should be in bed, and the curtain drawn. 2 *Salk.* 688. (1)

But if the witnesses subscribe their names to the will, in a room adjoining to that where the testator lay, but out of his sight, so as he could not see them subscribe their names; this is no good will within the statute to pass lands, because the witnesses in that case did not subscribe their names in the testator's presence. *Gilb.* 93.

But it is not necessary *that it appear upon the face of the will* to have been signed in the presence of the devisor. As in the case of *Hands* and *James*, *E.* 9 *G.* 2. In ejectment brought by the plaintiff as heir at law, the question was on a case by consent left to the opinion of the court, Whether it should be left to a jury to determine, whether the witnesses to a will (being all dead) did set their names in the presence of the testator, and this merely upon circumstances without any positive proof. By the court: This is a matter fit to be left to the jury. The witnesses by the statute ought to set their names as witnesses, in the

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(1) S. C. *Carth.* 81. S. P. *Casson* v. *Dade*, 1 *Bro. C. C.* 99. *Davy* v. *Smith*, 3 *Salk.* 395. *Hellard* v. *Jennings*, 1 *Lord Raym.* 505. *Per* lord *Macclesfield:* The bare subscribing the will by the witnesses in the same room does not necessarily imply it to be in the testator's presence, for it might be in a corner of the room in a clandestine fraudulent way, and then it would not be a subscribing in the testator's presence, merely because in the same room; but it being sworn by the witness, that he subscribed the will at the request of the testatrix, and in the same room, this could not be fraudulent, and therefore was well enough. *Longford* v. *Eyre*, *M.* 1721. 1 *P. Wms.* 740. But if the testator *could* not see his will attested if he would, it is void, though the witnesses retire for the purpose of his request. See *Broderick* v. *Broderick*, 1 *P. Wms.* 239. *Mackell* v. *Temple*, 2 *Show. R.* 288. *Longford* v. *Eyre*, 1 *P. Wms.* 740. *Carter* v. *Price*, *Dougl.* 241. *Hands* v. *James*, *Com. R.* 531. *Onions* v. *Tyrer*, 2 *Vern. R.* 741. Thus where the attesting witnesses retired from the room where the testator had signed, and subscribed their names in an adjoining room, and the jury found that from one part of the testator's room, a person by inclining himself forwards with his head out at the door might have seen the witnesses, but that testator was not in such a situation in the room that he might by so inclining have seen them; the will was held not duly attested. *Doe d. Wright* v. *Manifold*, 1 *M. & S.* 294.

presence of the testator; but it is not required by the statute that this should be taken notice of in the subscription to the will (2), and whether inserted or not, it must be proved: if inserted, it doth not conclude, but the contrary may be proved: And if not conclusive, when inserted, the omission thereof shall not conclude that it was not so: and therefore it must be proved by the best proof that the nature of the thing will admit of. *Comyn*, 531.

And in the case of *Croft* and *Pawlet*, *E.* 12 *G.* 2. Upon a trial at bar concerning the execution of a will, it did not appear upon the face of it, that the attestation of the witnesses was made in the presence of the testator; which being objected to, a case was cited, where lord chief justice *Eyre* held it a matter proper to be left to a jury, whether they believed it to be so done or not. And Mr. Justice *Chappel* cited a case to the same purpose. To which the court assented; and they held it not to be necessary to be inserted in the will, that the attestation was in the presence of the testator, though by the statute it is necessary that it should in fact be so attested. *Vin.* tit. *Devise*, N. 9. (*k*)

By three or four credible witnesses (3)] *M.* 1 *W. Lee* and *Libb.* The testator made his will in writing, subscribed by two witnesses, and therein devised his lands. Afterwards he made a codicil, in which his will was recited; and this also was attested by two witnesses, one of which witnesses was a witness to the will, but the other was a new witness. The question was, Whether this new witness should make a third to the will. And it was adjudged that he should not: It is true, here are three witnesses to the intent and will of the testator; but there are only two to his will in writing: It is true likewise, that there are two witnesses to the codicil; but those are not witnesses to the written

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(2) *Brice* v. *Smith*, *Willes*, *R.* 1. S. P.

(*k*) And *per* lord *Mansfield*, in *Bond* v. *Seawell*, 3 *Bur.* 1775. "It is not necessary that the witnesses should attest in the presence of each other, or that the testator should declare the instrument executed 'to be his will,' or that the witnesses should attest every page, folio, or sheet, or that they should know the contents, or that each folio, page, or sheet, should be particularly shewn to them."—But in that case, there being some doubt, whether the first sheet was or was not in the room at the time of executing and attesting the last, a new trial was directed. See further on this head, *ante*, 1. note; and *infra*, 11.

(3) As to the *mode* of proving a will in trials at law and in equity, see *infra*, 249, and note. In *Clarke* v. *Turton*, 11 *Ves.* 240. a question whether the attestation of a vice-consul abroad, as a separate act by him as such, and sealed with his official seal to operate as a certificate, could be considered as the signature of a subscribing witness to a will of real estate within the statute of frauds, was sent to be tried at law.

will; so that there wants one witness to the will in writing. 3 *Salk.* 395. [3 *Mod.* 262. S. C. 1 *Eq. Cas. Abr.* 403. S. P.]

In the case of *Tuffnell* and *Page*, *E.* 1740, it was held clearly by lord *Hardwicke*, that a will of a copyhold tenant, attested by one or two witnesses, or even without any witness at all, is sufficient to declare the uses of a surrender which he has made; and the reason is, because the party is in by the surrender, and not by the will. *Barnard. Cha. Ca.* 12.

Therefore where there is a general devise of lands, and there is no surrender of the copyhold lands to the use of the will, the construction at law is, that they do not pass by the will; for copyhold lands are not properly the subject of a devise, as they pass not by the will, but by the surrender. 1 *Atkyns*, 388.

Credible witnesses (4)] *M.* 34 *Cha.* 2. *Hudson's* case. Two witnesses swore, that the testator did not publish it as his will, but that another guided his hand, and that the testator made his mark, but said nothing, nor was he capable. On the other side, it was proved, how that the testator had made two former wills, and in them had devised his land in the like manner as by this will, and that he died of a consumption, and was sensible to the last; and how that three days after making his last will, he was sensible and able to discourse, and so continued till within six days of his death; hereupon it appeared, that the witnesses had been dealt with. To which the counsel on the other side urged, that if the witnesses were not to be believed, then there would not be three witnesses to the will, and so no will within the statute. To which *Pemberton* chief justice answered, that if there were three witnesses to a will, whereof one was a thief or person not credible; yet the words of the statute being satisfied, and he having collateral proof to fortify the will, he would direct a jury to find it a good will; and as to this case, he said it was not probable, that a person in his senses (as they are not able to disprove him to be) would suffer another to guide his hand to a writing and not say any thing; and that therefore they

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(4) The wife of an acting executor, taking no beneficial interest under the will, is a competent attesting witness to prove the execution of it within the description of a *credible witness* in the statute of frauds. *Bettison* v. *Bromley*, 12 *East. R.* 250. So an executor in trust under a will, who takes no beneficial interest under it, is a competent attesting witness to prove the execution of it within the statute of frauds. *Phipps* v. *Pitcher*, 2 *Marsh.* 20. 6 *Taunt.* 220. 1 *Madd. R.* 144. S.C. And see *Doe d. Hotchkiss* v. *Pearce*, 2 *Marsh.* 102. But the husband of a devisee of a life estate was held not competent. *Hatfield* v. *Thorp*, 5 *B. & A. Rep.* 589. Again, in *Price* v. *Lloyd*, *T.* 1759., 1 *Ves.* 503., where a witness to a will was a creditor to a testator, the court would not adjudge him altogether incompetent; for there are many instances of a servant being a witness to his master's will, and a legatee also.

took it he did publish it: And he remembered *Digge's* case, where the scrivener wrote the will, and two others were witnesses; the scrivener swore the testator was *compos*, and the two others swore he was not *compos:* the court stopped these two from going away till verdict was brought in, which found the will a good will, and then committed the two witnesses to the
[85] Fleet; for if this was suffered, it would be in any man's power to destroy another's will. So likewise did the court here commit the witnesses, and took security of the plaintiff to prosecute them for perjury. *Skin.* 79.

And in the case of *Alexander* and *Clayton, E.* 8 *G.* 3., where a woman had sworn against her own attestation, Mr. Justice *Yates* said, she ought not to have been admitted to give this evidence. And lord *Mansfield* observed, that it is of terrible consequence that witnesses to wills should be tampered with to deny their own attestation. But he said, that will not invalidate the will: for there are cases where one witness hath supported a will, by swearing that the other two attested, though those two have denied that they did so. 4 *Burr. Rep.* 2224.

And in the case of *Lowe* and *Jolliffe, E.* 2 *G.* 3. On a trial at bar, on an issue out of chancery concerning lands in Worcestershire, the three subscribing witnesses to the testator's will, and the two surviving witnesses to a codicil made four years subsequent to the will, and a dozen servants of the testator, all unanimously swore him to be utterly incapable of making a will, or transacting any other business, at the time of making the supposed will and codicil, or at any intermediate time. To encounter this evidence, the counsel for the plaintiff examined several of the nobility and principal gentry of the county of Worcester, who frequently and familiarly conversed with Mr. Jolliffe the testator, during that whole period, and some on the day whereon the will was made, and also two eminent physicians, who occasionally attended him; and who all strongly deposed to his intire sanity, and more than ordinary intellectual vigour. They also examined to the like purpose the attorney, a person of unblemished reputation, who drew the will; and read the deposition of the attorney who drew and witnessed the codicil, who was dead, but his testimony was perpetuated in chancery, who spoke very circumstantially to the very sound understanding of the testator, and his prudent and cautious conduct, in directing the contents of his codicil. Upon the whole it appeared to be a very black conspiracy to set aside the will, without any foundation whatsoever; the defendant's witnesses being so materially contradicted, and some of them so contradicting themselves, that the jury, after a trial of fifteen hours, brought in a verdict for the plaintiff, to establish the validity of the will and codicil, after an absence of five minutes. Lord *Mansfield*

then declared himself fully persuaded, that all the defendant's witnesses, except one, being nineteen in number, were grossly and wilfully perjured; and called for the subscribing witnesses, in order to have committed them in court, but they had withdrawn themselves. However, a prosecution of some of them for perjury was strongly recommended by the court. And the three testamentary witnesses were afterwards convicted, and sentenced, each of them to be imprisoned for six months, to stand twice in the pillory, with a paper on their heads denoting their crime, once at Westminster-hall gate, and once at Charing-cross, and to be transported for seven years. 1 *Bla. Rep.* 365. 416. (5)

In 1 *Ld. Raym.* 85. it is said, that if the spiritual court refuse the evidence of the son to prove a will in which the father is a legatee, no prohibition is grantable. And before the delegates; There were three witnesses to prove a nuncupative will, two of them were without exception, and the third was son to the legatee: the statute of frauds requires three competent witnesses; the question therefore was, Whether these three were sufficient, the son not being an evidence by the spiritual law; and adjudged, that they were; because two only were required by the spiritual law, and the third was a good witness within the intent of the act of frauds.

And although it was a general rule in the Roman law, that no one should be permitted to bear testimony in his own cause; yet legataries were allowed to give evidence upon this distinction, that they were particular and not universal successors, and that a testament would be valid without legataries. The difficulty also, which must frequently have occurred, in obtaining so great a number of witnesses as seven, might probably induce the Romans to be less strict, as to the persons whom they admitted upon this occasion. But by the practice of the ecclesiastical courts of this kingdom, which have the sole cognizance of the validity of all wills as far as they relate to personal estate, no legatee, who is a subscribing witness to the will, by which he is benefited, can be admitted to give his testimony *in foro contradictorio*, as to the validity of that will, till either the value of his legacy hath been paid to him, or he hath renounced it; and in case of payment, the executor of the supposed will must release

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(5) Mr. *Phillipps* thus states the rule: If a subscribing witness should deny the execution of the will, he may be contradicted as to that fact by another subscribing witness; and even if they all swear that the will was not duly executed, the devisee would be allowed to go into circumstantial evidence to prove the due execution. *Austin* v. *Willes*, *Bull. N. P.* 264. *Pike* v. *Badmering*, cited 2 *Stra.* 1096. *Love* v. *Jolliffe*, 1 *Bla. R.* 365.

all title to any future claim upon such supposed legatee, who might otherwise be obliged to refund, if the will should be set
[87] aside; and a release in this case is always made, to the intent that the legatee may have no shadow of interest at the time of making his deposition. The same practice also prevailed at common law, in regard to witnesses who were benefited under wills disposing of real estate. And if a legatee, who was a witness to a will, had refused either to renounce his legacy, or to be paid a sum of money in lieu of it; he could not have been compelled by law to divest himself of his interest; and whilst his interest continued, his testimony was useless. And this was determined in the case of *Anstey* and *Dowsing*, *E.* 19 *G.* 2., which was thus: James Thompson esquire made his will, by which he disposed of his real estate, and gave to one John Hailes and his wife 10*l.* each for mourning, and an annuity of 20*l.* to Elizabeth Hailes the wife of John. This will of James Thompson was regularly attested, as the statute directs, by three witnesses, of which number the above-named John Hailes was one; and he refused to be paid 20*l.* in lieu of his wife's legacy and his own. The cause was thrice argued at the bar, and the judges of the king's bench were unanimously of opinion, that a right to devise lands is not a common law right, but depends upon powers given by statutes, the particulars of which are, that a will of lands must be in writing, signed and attested by three credible witnesses in the presence of the devisor: that these were checks to prevent men from being imposed upon; and certainly meant, that the witnesses to a will (who are required to be credible) should not be persons who are intitled to any benefit under that will; and that therefore John Hailes was not a good witness. (*Str.* 1254.) But this very singular case, and the unanimous opinion of the judges upon the meaning and intent of the statute of frauds and perjuries, gave rise to the act of parliament here following. *Harr. Justin. B.* 2. *p.* 49, 50.

[Who are legal witnesses within 29 *Car.* 2. c. 3. § 5.]

Which act is that of the 25 *G.* 2. *c.* 6. and runs thus: *Whereas some doubts have arisen on the act for prevention of frauds and perjuries, who shall be deemed legal witnesses within the intent of the said act*, it is enacted, that if any person shall attest the execution of any will or codicil which shall be made after *June* 24, 1752, to whom *any beneficial devise, legacy*, estate, interest, gift, or appointment of or *affecting any real or personal estate* (other than and except charges on lands, tenements, or hereditaments, for payment of any debt or debts) shall be thereby given or made; *such* devise, *legacy*, estate, interest, gift, or appointment, *shall, so*
[88] *far only as concerns such persons attesting the execution of such will or codicil, or any person claiming under him, be utterly null and void* (6); and such person shall be admitted as a witness to the

(6) A legacy to a subscribing witness to a will of *personalty* is void

execution of such will or codicil within the intent of the said act, notwithstanding such devise, legacy, estate, interest, gift, or appointment, mentioned in such will or codicil. § 1.

And in case by any will or codicil any lands, tenements, or hereditaments are or shall be charged with any debt or debts; and any creditor whose debt is so charged hath attested or shall attest the execution of such will or codicil; every such creditor, notwithstanding such charge, shall be admitted as a witness to the execution of such will or codicil, within the intent of the said act. § 2.

And if any person hath attested the execution of any will or codicil already made, or shall attest the execution of any will or codicil which shall be made on or before June 24. 1752, to whom any legacy or bequest is or shall be thereby given, whether charged upon lands, tenements, or hereditaments, or not; and such person, before he shall give his testimony concerning the execution of any such will or codicil, shall have been paid, or have accepted or released, or shall have refused to accept such legacy or bequest, upon tender made thereof; such person shall be admitted as a witness to the execution of such will or codicil, within the intent of the said act, notwithstanding such legacy or bequest. § 3.

Provided that, in case of such tender and refusal as aforesaid, such person shall be in no wise intitled to such legacy or bequest, but shall be for ever afterwards barred therefrom; and in case of such acceptance as aforesaid, such person shall retain to his own use the legacy or bequest which shall have been so paid, satisfied, or accepted, notwithstanding such will or codicil shall afterwards be adjudged or determined to be void, for want of due execution, or for any other cause or defect whatsoever. § 4.

And in case any such legatee as aforesaid, who hath attested the execution of any will or codicil already made, or shall attest the execution of any will or codicil which shall be made on or before the said 24th day of June, 1752, shall have died in the lifetime of the testator, or before he shall have received or released the legacy or bequest so given to him as aforesaid, and before he shall have refused to receive such legacy or bequest, on tender made thereof; such legatee shall be deemed a legal witness to the execution of such will or codicil, within the intent of the said act, notwithstanding such legacy or bequest. § 5.

Provided always, that the credit of every such witness, so attesting the execution of any such will or codicil, in any of the

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under this act, which extends to *all* wills and codicils. *Lees* v. *Summergill*, 17 *Ves.* 509.

cases in this act before mentioned, and all circumstances relating thereto, shall be subject to the consideration and determination of the court and the jury, before whom any such witness shall be examined, or his testimony or attestation made use of; or of the court of equity, in which the testimony or attestation of any such witness shall be made use of; in like manner to all intents and purposes, as the credit of witnesses in all other cases ought to be considered of and determined. § 6.

And no person, to whom any beneficial estate, interest, gift, or appointment shall be given or made, which is hereby enacted to be null and void as aforesaid, or who shall have refused to receive any such legacy or bequest, on tender made as aforesaid, and who shall have been examined as a witness concerning the execution of such will or codicil, shall, after he shall have been so examined, demand to take possession of, or receive any profits or benefit of or from any such estate, interest, gift, or appointment, so given or made to him, in or by any such will or codicil; or demand, receive, or accept any such legacy or bequest, or any satisfaction or compensation for the same, in any manner, or under any colour or pretence whatsoever. § 7.

Provided, that nothing herein shall extend to the case of any heir at law, or of any devisee in a prior will or codicil of the same testator, executed and attested according to the said recited act, or any person claiming under them respectively, who has been in quiet possession for the space of two years next preceding the 6th day of May, 1751, as to such lands, tenements, and hereditaments, whereof he has been in quiet possession as aforesaid; nor to any will or codicil, the validity or due execution whereof hath been contested in any suit in law or equity commenced by the heir of such devisor, or the devisee in any such prior will or codicil, for recovering the lands, tenements, or hereditaments mentioned to be devised in any will or codicil so contested, or any part thereof; or for obtaining any other judgment or decree relative thereto, on or before the 6th day of May, 1751, and which has been already determined in favour of such heir at law or devisee in such prior will or codicil, or any person claiming under them respectively, or which is still depending, and has been prosecuted with due diligence; but the validity of every such will or codicil, and the competency of the witnesses thereto, shall be adjudged and determined in the same manner, to all intents and purposes, as if this act had never been made. § 8.

Provided, nevertheless, that no possession of any heir at law or devisee in such prior will or codicil as aforesaid, or of any person claiming under them respectively, which is consistent with, or may be warranted by or under, any will or codicil, attested according to the true intent and meaning of this act, or

where the estate descended or might have descended to such heir at law, till a future or executory devise, by virtue of any will or codicil, attested according to this act, should or might take effect, shall be deemed to be a possession within the intent and meaning of the clause herein last before contained. § 9.

Afterwards, this matter came in consideration again, in the case of *Wyndham* and *Chetwynd*, *M.* 31 G. 2. 1757. Which was on an issue out of chancery, *devisavit vel non*, to try the validity of the will of one Mr. Chetwynd deceased. The jury found a special verdict, with regard to the attestation of this will; wherein it was stated, that the testator died March 17, 1750, leaving the will in question, which was regularly attested by three subscribing witnesses, Higden, Squire, and Baxter; that the testator was indebted about 18,000*l.* upon mortgage of his real estate, and left a personal estate to the amount of 13,972*l.* which was greatly superior to all his specialty and simple contract debts; that he charged his real estate with the payment of his debts and legacies; that at the time of attesting this will he was indebted to Higden, the witness, (who was an apothecary,) about 11*l.*, and at the time of his death about 18*l.*, which had been paid off by the executor before the trial of the issue; that he was indebted to Squire and Baxter, the other witnesses, who were two attornies, in partnership, about 280*l.*, at the time of attestation, which also (except a small mistake in miscasting) was out-set or discharged before the day of trial. If these were three credible witnesses within the statute of frauds, the jury found the devise to be sufficient; otherwise, insufficient.

It was argued by serjeant Prime, for the plaintiff: first, That the facts, as stated, did not make them interested witnesses; secondly, That, supposing them to have been interested, yet the interest was removed before the time of trial. As to the first: They are no legatees, and derive nothing from the gift or bounty of the testator; they were justly entitled to payment of their debts, though no will had ever been made; the personal assets were the proper fund for them to resort to, and that is sufficient to pay their demands; so that they are not interested in the charge on the real estate. As to the second point: They were competent witnesses at the time of examination, their debts being then discharged. The word *credible* in the statute is an ambiguous expression, and capable of many senses; but there seems to be a parliamentary exposition thereof in the statute of [91]
4 & 5 *An. c.* 16. § 14., whereby three witnesses are required to authenticate a nuncupative will; and it is declared, that such as are good witnesses in trials at common law shall be deemed good witnesses to establish a nuncupative will. Now allowing the same exposition to take place in the statute of frauds; then, as these witnesses would be unexceptionable on a trial at

law in respect of interest, so they are competent (and therefore credible) witnesses to the present devise. And in this, and the former argument, there were cited divers cases to this purpose.

On the other side, Mr. Norton argued for the defendant; that at the time of the *attestation* the witnesses were interested, and therefore incompetent; and that this, and not the time of examination, is the proper time of inspecting their credibility; else it would open greater opportunities of fraud and perjury, than before the act: it would be setting up witnesses to hire; and would put the validity of the will in the power of the witnesses, by releasing or not releasing their interest. If a witness is unexceptionable at the time of attestation, and afterwards becomes infamous or insane, the will is nevertheless a good will: which proves that his condition at the time of attestation is alone to be regarded. And to this purpose were cited also divers cases; and it was observed, that most of the cases cited on the other side were prior to the statute of frauds. He insisted, that the word *credible* means something more than *competent:* the law required competency before; and it is not to be imagined, that the learned compiler of this statute (lord Hale) would put in a word, which at best was superfluous: that in the statute of the 13 *C.* 2., against deer-stealing, and in all the game laws, the expression of *credible* witness is used, which hath always been understood to mean more than *competent*, and to give the justices a discretion whether they will convict upon such testimony or not, though the witness was in law strictly admissible. And he insisted on two cases, as directly in point; viz. *Hilliard and Jennings*, 1 *L. Raym.* 505., and *Ansty* and *Dowsing*, 19 *G.* 2.

On the argument, lord Mansfield expressed his doubts of that generally received opinion, that lord Hale drew the statute of frauds, 29 *C.* 2., he having died in 1676, in the 28 *C.* 2.; and observed also, that the statute of the 4 & 5 *An.* was
[92] enacted to check the extravagant notions of some civilians, by which they excluded from being witnesses the children and family of the testator, as well as of the legatee; arising from a fiction in the Roman law, by which testaments are transacted in the form of a sale between the devisor and the devisee, to which none of either family were allowed to be witnesses.

Afterwards, in the same term, lord *Mansfield* delivered the opinion of the court. In this case the real estate is only charged with payment of debts, as an auxiliary fund to the personalty; which stands in need of no assistance, being itself much greater than the debts: and, at the time of trial, the three witnesses were not creditors to either the real or personal estate, but were so at the time of attestation. And herein the question is, whether this be a valid attestation, according to the statute of frauds. This is a doubt which sprang out of the general question in *Ansty* and *Dowsing*, whether a benefit to a witness arising from

a will shall annul his testimony, though at or after the testator's death he becomes totally disinterested. The solution of this question depends upon general principles; not upon the words of the statute. The statute declares no incapacity, lays down no legal conditions for admitting witnesses. The word *credible* is no term of art: it has only one signification, and that universally received: it is never used as synonymous to legal competency: it presupposes evidence to have been already given. The consideration of competent is previous to that of credible; and in the statutes which have been mentioned at the bar, the expression so frequently used, of credible witnesses, is never construed to mean competent. To make the validity of a will depend upon the credibility of the witnesses would be absurd; since the testator could never foresee what credit might hereafter be given to them. It is true, that in *Butler* and *Baker*'s case, 3 *Co.* 36., the third caution there given is, to call credible witnesses: but that is only a loose and casual expression; though perhaps the penner of this statute might take his hint from thence. I cannot conceive (for the reasons I formerly mentioned) that this statute was drawn by lord Hale, any further than perhaps by leaving some loose notes, which were afterwards unskilfully digested. I therefore think that the epithet *credible*, in this statute, is used as a word of course, but is unfortunately misapplied: if it signifies competent, that is implied in the word *witness* alone: if it signifies any thing more than competent, it is (as was before observed) absurd. Perpetual doubts have arisen upon every [93] clause of this statute, not only among the unlearned, for whom it ought to have been calculated; but even among the learned also. In a statute so inaccurate, I therefore think the word *credible* might accidentally slip in, and ought not to be attended to as if it carried any special legal meaning. I shall therefore consider the statute as only requiring the attestation of three subscribing witnesses, that is, legal, competent witnesses; and cannot but observe, that the necessity of having subscribing witnesses to any instrument never existed before in this country. The statute determines no point of time for the competence of witnesses; and as I think that competence is not confined to the time of attestation, so I think that the incompetence of witnesses at the time of examination could never be intended for a question by the legislature, since, however competent at the time of attesting, they may become insane or infamous before the time of examination.

The competence of witnesses to wills must therefore depend upon the general rules of competence for all other witnesses. I will therefore consider, first, How this matter of competent attestation would have stood upon general principles, supposing no judicial determination had been given. Secondly, How the

authority of judicial determinations stands; for if there are any in point, they are certainly proper to be adhered to. And, thirdly, How these two rules may be applied to the present case.

First, as to general principles: The power of devising ought to be favoured. It naturally follows the right of property. It subsisted in this kingdom before the conquest, and till about the reign of king Henry the second, when it ceased, in consequence of feudal tenure, not from any express prohibition. The doctrine of uses revived this power; and the statute of uses again accidentally checked it. This occasioned the statute of wills to be soon after made; which received a great enlargement by the alteration of tenures in the reign of king Charles the second. And this testamentary power over property is more reasonable in this kingdom, than ever it was among the Greeks and Romans; since by reason of primogeniture, and other exclusive rules of descent, the succession *ab intestato* among us is not so equal and universal as among those people. The statute of the 29 *C.* 2. was not meant to check this power, but only to guard against
[94] fraud. In theory it seemed a strong guard; in practice it may be some guard: but I believe more fair wills have been destroyed for want of observing its restrictions, than fraudulent wills obstructed by its caution. In all my experience at the court of delegates (and I have heard the same from many learned civilians), I never knew a fraudulent will which was not legally attested. Courts of justice ought therefore to lean rather against, than in support of, any too rigid formalities.

Suppose the subscribing witnesses honest, how little need they know? They do not know the contents: they need not be together; they need not see the testator sign; they need not know it to be a will. At the time this act was made, the law rejected no witness to prove a will, unless at the time of his examination his testimony tended to support his own title, and enable himself to hold or recover an interest under it. In the ecclesiastical court, the probate is conclusive to every one as to every part. If a legatee came to prove it, he entitled himself to his legacy: but if the legacy was contingent, and at the testator's death could not take effect; if he had the same or a greater interest, though the will should be set aside, he was a witness: a release, payment, or tender, made him a witness. In the courts of common law, where the witness had a charge upon land devised to another, he was just in the case of a personal legatee. If he had as great an interest the other way; if his interest at the testator's death could never take effect; if there was a release, and I will add, as by necessary consequence, if there was payment or tender; — he was a witness. Nice objections, of a remote interest, which could not be paid or released, though they held in other

cases, were not allowed to disqualify a witness in the case of a will; as parishioners might prove a devise to the use of the poor of the parish for ever. 2 *Sid.* 109. Interest in a witness is certainly an objection to his competency: this arises from a presumption of bias: it is no positive disability; as if a particular age was required and wanting in a witness: It is only presumptive; and presumptions only stand until the contrary is made apparent. If the bias be taken off, the objection ceases. There is no presumption of bias in a witness, who at the time of signing probably knew not the contents of the testator's will, and after his death is discharged from, or has renounced all interest arising from thence. Nothing can be more reasonable, than to allow this objection of interest to be purged by matter subsequent to the attestation, and previous to the trial, if it were only for the benefit of third persons. Shall tokens of kindness to friends, [95] servants, or the like, who may be unwarily called in as witnesses, vitiate a solemn and well-weighed disposition of a man's estate; when by payment or release this interest may be at once removed? This seems the more unreasonable, since there are methods by which legatees may by circuity be witnesses to a devise in their own favour, without either payment or release. If land be once charged with legacies by a well-attested will, legacies may be given by an unattested codicil to the witnesses of that very will.

As to the judicial authorities: In all cases of testimony it hath often been determined, that a release takes off all objection in point of interest. And therefore I give credit to the *dictum* of judge Powis, in *Viner*, tit. *Evidence*, F. § 53., not on the authority of the reporter, but because it is consonant to the known practice of Westminster-hall in other cases; *viz.* That it had been solemnly agreed by the judges, that where a person had a legacy given, and did release it, he was a good witness to prove the will. The case of *Hilliard* and *Jennings* (of which *Carthew*'s is the best report, he having been counsel in the cause) in substance is much the same as that of *Ansty* and *Dowsing*. In this last case, the wife of one of the witnesses had an annuity charged on the lands devised; no release was had; no payment, no tender, could be made; and as husband and wife are considered as one person, this was a material objection to his testimony; and it was upon the particular circumstances of that case, and not upon any general doctrine, that the judgment in that case was founded, as Mr. Justice Denison soon after assured me. It is true, the lord chief justice *Lee*, in delivering his opinion, went into the general point, and argued as if the credit of a witness could not be purged or varied by an act subsequent to the attestation; which he grounded on a maxim of the Roman law, *conditionem testium inspicere debemus eo tempore cum signarent:* But this was not

sufficiently considered; as will appear from a short view of the Roman testaments, which originally could only be made as a legislative act *in procinctu*, or in *comitiis calatis:* but after the law of the twelve tables, which gave the power of private testaments, testamentary matters were usually transacted *per es & libram*, under the fiction and in the form of a sale or contract between the testator and the legatees. These symbols were used before the introduction of written instruments: and to this symbolical sale five, and afterwards to the written instrument, seven witnesses were required, who must be citizens, freemen, adults, and attended with other qualifications. This positive capacity was the condition of the witnesses referred to in the Roman law; which was requisite to be in them at the time of their attestation or signing, and not afterwards; in like manner as where a surrender must be made into the hands of two copyhold tenants, it will not be good if made into the hands of a stranger, though he should afterwards become a copyholder. The interest of the witnesses was not in the contemplation of the law; for heirs were admitted as subscribing witnesses after the symbolical sale had ceased, as were also *cestui que trusts* and legatees. The consequence of this doctrine of lord chief justice *Lee* was, that no creditors or legatees, if the estates were charged to pay them, could at any rate be good witnesses. And yet when lord Aylesbury died in February, 1746, leaving a new-made will, witnessed by three servants, to all of whom he had left legacies charged on lands, which they released before examination, and it appearing that by a former will dated in 1744, and witnessed by other persons, he had left the same legacies, the lord chancellor, in 1748, held them to be good witnesses to the second will, for it was indifferent to them which will should stand good, and besides they had released. And in the case of *Baugh* and *Holloway*, 1 *P. Will.* 557., lord *Raymond* lays down the same general doctrine that I would now establish; and also another point, which agrees with my opinion, that an interested witness may prove a devise to another, though not to himself. In all judicial determinations, devises have been considered, not in the nature of wills by the Roman law, but as dispositions and conveyances of real estates; whence it is, that by such disposition of all one's estate, lands that are purchased subsequent thereto will not pass: Therefore the interest of witnesses to devises should be governed by the same rules, as in all other written dispositions of real estates. As to the notion started in the argument of *Ansty* and *Dowsing*, of four devisee witnesses dividing an estate among themselves, by reciprocally attesting for each other; this might as well be effected by four distinct devises separately attested by three of them in rotation. But in either case, the very contrivance would appear so fraudulent, as alone to be sufficient to set it aside.

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With respect to the present case, on its own particular circumstances:—These witnesses are in the nature of legatees; not several devisees. The presumption of interest at the time of attestation is taken off at the death, by the principal funds being more than sufficient. It is taken off before the trial, by the debts being paid. But the benefit, at the time of attestation, was nothing. It doth not appear the principal funds then were deficient. The legacy is a bare possibility, upon a contingency, which contingency never happened. But I will go farther; I think a charge to pay debts ought not to incapacitate subscribing witnesses, although they wanted and claimed the benefit of it. Every honest man should make that charge in his will. He who omits it, is said to sin in his grave. Fraud cannot be presumed, from inserting a clause which it would be iniquitous not to put in. No man would resort to wicked and fraudulent practices, to get his debt charged upon land by the will of his debtor. If he suspected the debtor's circumstances, he would not stay till his death, or trust to a revocable security. The presumption of fraud in this case would be against justice and truth; and the public inconvenience so great, that hardly a will could stand. This charge ought to be in every will. The persons attending upon a dying testator, and therefore most common witnesses, are generally in some degree creditors; such as servants, parson, attorney, and apothecary: and the disallowing such persons to be witnesses cannot answer any ends of public utility. Upon the whole, we are all of opinion that this will is duly attested by three witnesses. *Black. Rep.* 95. (*l*)

Afterwards, in the case of *Hindson* and *Kersey*, *E.* 5 *G.* 3. 1764, a special case was reserved from Appleby assizes before Mr. Justice *Bathurst* in 1760, which was thus: John Knott, being seised of a messuage and other tenements, at Mauls Meburn, in the county of Westmoreland, by his will bearing date August 16, 1734, (which was before the mortmain act of 9 *G.* 2. and therefore that was out of the question,) devises his messuage and lands in the will particularly mentioned (after the death of his wife) to John White, Christopher Moss, Henry Holme, William Dent, Robert Burra, and William Burra, in trust, that they and their successors for ever dispose of the rents and [98] profits to poor orphans, aged, and impotent people within the township of Mauls Meburn, and put out the children of such poor people apprentices. Other lands and tenements there he devised to his wife for life, remainder to Anne Gibson for life, remainder to Mary Brown for life, remainder to Anne Hebson in fee. Anne Gibson (after the wife's death) entered as devisee on that part devised to her; and the heirs at law brought an

(*l*) S. C. 1 *Bur.* 414. [See 84. *note.*]

ejectment, alleging that the will was not duly attested according to the statute of frauds. The witnesses were two of the said trustees, Henry Holme and Robert Burra, and the third John Mitchell; all of whom, at the time of the attestation, and at the death of the testator, and long after, were respectively seised of messuages and tenements in the said township of Mauls Meburn, and were assessed to and paid the poor tax there. But before the time of trial, the said Henry Holme and Robert Burra released all their interest under the will to the other trustees, and they and also John Mitchell conveyed away their respective messuages and tenements within the said township. The question was, whether, under these circumstances, the said writing purporting to be the will of the said John Knott was sufficient and effectual to pass the aforesaid lands and tenements to the said Anne Gibson.—Upon the hearing of this cause in the court of common pleas, the three puisne judges delivered their opinion in favour of the will; and the lord chief justice *Pratt* (afterwards lord Camden) declared his opinion against it, and argued to the following effect: Two questions arise out of this will, first, Whether it is executed according to the statute of frauds; and secondly, If not, whether the objection to it is cured by the late act. In handling this subject, I shall be obliged to differ from the opinion of the court of king's bench delivered by lord *Mansfield* in the case of *Wyndham* and *Chetwynd*; or rather (for so I wish to put it) I shall agree with the judgment of the same court delivered by lord chief justice *Lee* in the case of *Ansty* and *Dowsing*. For as both the opinions are justified by authorities of equal weight, a man may take either side without hazarding his reputation. The case of *Wyndham* and *Chetwynd* supposes that the word *credible* in the act is only a word of course, and ought not to be attended to as conveying any special legal meaning; and that the other word *witness* is to be expounded by common law analogy. From
[99] whence this rule was taken, that as at common law no man was allowed to be a witness to prove an interest for himself; so since the statute, no man shall by his own subscription take an interest which he could not prove at the time by his own examination. And from the rule thus framed it was concluded, not only that a release or payment will re-establish the witness, if his incompetency really stands in the way; but further, that such a witness may even without a release be competent enough to prove the will for every person except himself.

In opposition to this reasoning I propose to maintain, that this credibility, which I shall prove to be competency, is a necessary and substantial qualification of the witness, at the time of attestation; that if the witness is incompetent at that time, he cannot purge himself afterwards, either by release or payment, so as to

set up the will; and that he cannot be a witness in that case to establish any part of the will, but that the whole is void for ever. As my brothers differ with me upon the second question, by holding that the witnesses are competent by the rule of law, I might, if I thought it fitting, leave all the other points undiscussed, as not absolutely necessary to the decision of this case. And I should have been glad for several reasons to have done it, if other reasons more weighty with me had not determined me the other way. One is, that as the whole argument is connected by a chain, those parts whereon I am bound to speak could not be so clearly illustrated, if the others were omitted; for they all throw light upon each other, and the former are proper and material introductions to the latter. Another reason is, that as the same case may again exist, and even this case may yet come before another court; and likewise, as no cases of the like kind, in my opinion, are cured by the late act; but that future wills, as well as those that are past, under such like attestations, must occasion the same questions, when they happen to be contested; I think myself bound in duty to declare my dissent to the last opinion of lord Mansfield, and do my best endeavours to restore that of lord chief justice Lee, which has been so considerably shaken, I may say overturned; because the last opinion, if it is acquiesced under, almost always governs, and becomes the leading case. I am very sensible, at the same time, that I am destroying an honest will, upon a nominal objection; for the interest here, which I must treat as a serious incapacity, is too slight even to disparage the witness's credit, if he could be sworn: and yet I [100] must adjudge him, upon this objection, to be a person so destitute of all credit, that he is not fit even to be examined. But as it is not my business to decide cases by my own rule of justice, but to declare the law as I find it laid down; if the statute of frauds has enjoined this determination, it is not my opinion, but the judgment of the legislature. As I am satisfied, however, that this will was fairly executed, I am very glad my brothers, by differing from me, have enabled me to give judgment in favour of it, against my own opinion. Before I proceed, I desire it may be understood, that I do by no means deny the authority of the judgment in *Wyndham* and *Chetwynd*; for that case was not determined only upon the general principles, which I am obliged in this argument to deny, but upon its own general as well as particular circumstances, none of which can be applied to the case of a mere legatee witness. The first general inquiry then being this, who are those witnesses which are described in the act by the word *credible?* I answer, in one word, they are *competent* witnesses, and no other. And when it is further asked, at what time must the witnesses be endued with this qualification? I say, that they must be clothed with it at

the time of attestation. And here I must premise one observation, that there is a great difference between the method of proving a fact in a court of justice, and the attestation of that fact at the time it happens. These two things I suspect have been confounded. Whereas it ought always to be remembered, that the great inquiry upon this question is, how the will ought to be attested, and not how it ought to be proved. The new thing introduced by the statute is the attestation; the method of proving this attestation stands as it did upon the old common-law principles. Thus, for instance, one witness is sufficient to prove what all the three have attested; and though that witness must be a subscriber, yet that is owing to the general common-law rule, that where a witness hath subscribed an instrument, he must be always produced, because it is the best evidence. This we see in common experience: for after the first witness has been examined, the will is always read. The statute says, the will must be executed before three credible witnesses. If it be asked, whether the quality of credibility is requisite in the witness at the time of attestation? I answer, nothing can be more clear upon the words, if credibility means any thing; for
[101] what is the clause, but a description of those solemnities that are to attend the execution? among which the presence of credible witnesses is made necessary. It is admitted, that if any other description had been added to the witnesses, that must have belonged to them at the time: as if three Englishmen, or three full-aged persons had been required, these adjuncts would have been necessary at the time; and if so, I see not by what rule of construction one epithet or adjunct can be distinguished from another. Nay, if the word *credible* be expunged, and the word *witness*, as it is admitted, doth of itself alone include *competent*, still competency must be essential to the witness at the time of execution: and a competent witness in the eye of the law is a witness that is not infamous nor interested. So that, take it which way we will, an interested witness cannot be the witness the law intends to be present at the execution. And that the statute had a main view to the quality of the witnesses, will appear from this consideration; namely, that a will is the only instrument in it required to be attested by subscribing witnesses at the time of execution. It was enough for leases and all other conveyances, marriage agreements, declarations, and assignments of trust, to be in writing: these were all transactions of health, and protected by valuable considerations and antecedent treaties; the power of a court of equity was fully sufficient to meet with every fraud that could be practised in these cases, after the contract was reduced into writing. But a will was a voluntary disposition, executed suddenly in the last sickness, oftentimes almost in the article of death. And the only ques-

tion that can be asked in this case is, Was the testator in his senses when he made it? and consequently, the time of execution is the critical minute that requires guard and protection. Here you see the reason why witnesses are called in so emphatically. What fraud are they to prevent? Even that fraud so commonly practised upon dying men, whose hands have survived their heads; who have still strength enough to write a name, or make a mark, though the capacity of disposing is dead. What is the condition of such an object in the power of a few who are suffered to attend him, wheedled or teazed into submission for the sake of a little ease, put to the laborious task of recollecting the full state of all his affairs, and to weigh the just merits and demerits of those who belong to him, by remembering all, and forgetting none? Such an act, to be done at such a time, is so pregnant with suspicion, that a formal declaration of the [102] testator's sound and disposing mind and memory, though he is weak in body, is grown to be a common introductory clause to almost every testament. Who then shall secure the testator in this important moment from imposition? Who shall protect the heir at law, and give the world a satisfactory evidence that he was sane? The statute says, three credible witnesses. What is their employment? I say, to inspect and judge of the testator's sanity before they attest. If he is not capable, the witnesses ought to remonstrate and refuse their attestation. In all other cases the witnesses are passive; here they are active, and in truth the principal parties to the transaction: the testator is intrusted to their care. Sanity is the great fact the witness has to speak to, when he comes to prove the attestation; and that is the true reason why a will can never be proved as an exhibit *vivâ voce* in chancery, though a deed may; for there must be liberty to cross-examine to this fact of sanity. From the same consideration, it is become the invariable practice of that court, never to establish a will unless all the witnesses are examined; because the heir has a right to proof of sanity from every one of them whom the statute has placed about his ancestor. (7) And yet this duty of the witness, this solemn trial of the testator's sanity, hath been called a matter of form, and of no use to prevent frauds. I am of a very contrary opinion. That many fraudulent wills have been made since the statute, and all formally executed, I have no doubt; and I am afraid these frauds will continue to the end of time; for what law can totally extinguish wickedness, and reform mankind? But if a law is to be slighted, because it doth not entirely eradicate the mischief it was made to prevent, no law whatever can escape censure. Many bad wills have been made; but who can tell me how many have been pre-

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(7) See *infra*, 249., and note there.

vented? The design of the statute was to prevent wills that ought not to be made, and always operates silently by intestacy. I have no doubt but that a thousand estates have been saved by this excellent provision. It is called a guard in theory only; whereas almost every delirious paralytic, that is suffered to die intestate, is preserved by this law, and gives testimony of its utility. But if you once treat this part of the solemnity as a form, and call the devisees and legatees into the sick man's chamber; the whole ceremony will then, I admit, become a mere form: nay it will be worse, it will be a snare to the testa-
[103] tor; and instead of being a prevention, it will be a protection, of fraud. I will close this reasoning with the words of the court in the case of *Lea* and *Libb*, as reported in *Carth.* 37. "'Tis true, "the intent of the statute was to prevent fraud; but though no "suspicion of fraud appears in this case, yet the statute hath "prescribed a certain method, which every one ought to pursue "to prevent fraud." And if this is the true language of the statute of frauds, the consequence is undeniable, that the incompetency can never be purged, and that the whole will is void for ever.

This being the criterion of credibility, I proceed to consider, how far the witnesses to this will are affected by it. The case is this: The testator deviseth certain lands to trustees, to be applied to the use of such poor as by reason of infancy, impotence, or old age, are unable to work, and to place out apprentices the children of such poor. The three witnesses who attested the will are seised of lands in fee within the parish at the time of attestation. The objection is, that these witnesses cannot be admitted to prove the will in court, while they remain so seised, because by the establishment of the will they will derive an interest to themselves in respect of those lands. Their interest is this, that as the poor-rate must be reduced in proportion to the value of this benefaction, their estates will become rate-free for so much for ever. And although the devise at the time of the testator's death was future, and did not take effect till some years after; yet it was a present benefit to the owner of those lands, and made them immediately more valuable, in consideration of this future easement. It is objected, that the interest claimed under the will is nothing; that it is nothing at present; that it is contingent in future; and that at most it is extremely minute. 'Tis true, it is not given to the parishioners; but it is an interest derived to the parishioners in consequence of the will; which is the common case of penalties given to the poor: they gain if the will is established, they lose if it is set aside. I do admit also, it is no easement in present; but in respect of future easement, it is even now a present and lasting benefit; and in truth, all future interests, whether certain or contingent, whether now or

hereafter to be enjoyed, are present benefits, have a price, and are saleable. The court of chancery therefore hath very sensibly pronounced possibilities to be vested interests, and made them transmissible. A fee expectant upon a thousand years' term has been sold for money. Let me put the case of an exe- [104] cutory devise of an estate of 10,000*l.* a year, and the life before it in a deep consumption, (I am entitled to put the strongest case I please,) could this devisee be a competent witness to prove the will? The answer must be, he could not. Tell me then what chances are valuable and what not? Till this line is drawn, I must insist that all chances are valuable. As to the objection, that the interest is minute, and that a small interest, as in *Townshend's* case, ought not to disqualify witnesses: I do conceive, that however that point might have been litigated formerly, yet now the law is clearly settled, and the witness must be rejected, if he has any interest, be it ever so small. The point was disputed for above twenty years, in the case of toll or custom claimed by the city of London, upon importation, called by the name of water bailage. The question was, whether freemen might be witnesses. Nothing can be more minute than such an interest; and yet, after many opinions *pro* and *con.* it was finally settled that they were not witnesses. True it is, that the interest of the witnesses in some cases is drawn so fine, that it is scarce perceptible; and yet that glimmering, that *scintilla*, shall be as powerful to exclude the witness as the most substantial proof. The true ground whereof is this; that as no positive law is able to define the quantity of interest that shall have no influence upon the minds of men, it is better to leave the rule inflexible than permit it to be bent by the discretion of the judge.—— [And therefore to divest a legatee witness of all kind of interest in time to come, the late act hath taken the most effectual method, by making his legacy totally void. In the present case, the parties, to avoid any further litigation, came to an agreement and divided the estate amongst them.]

In the case of *Pendock* and *Mackendor*, *H.* 28 *G.* 2. On a special case reserved at the assizes, the question was, whether one of the witnesses to the will was a sufficient witness within the statute, who before the time of attestation had been indicted, tried, and convicted for stealing a sheep, and was found guilty to the value of ten pence, and had judgment of whipping. After three arguments at the bar, the whole court of common pleas were clearly of opinion that he was not a competent witness; and laid it down as a rule, that it is the crime that creates the infamy, and takes away a man's competency, and not the [105] punishment for it; and it is absurd and ridiculous to say it is the punishment that creates the infamy. The pillory has been always looked upon as infamous, and to take away a man's com-

petency as a witness. But to shew the absurdity of this notion, suppose a man is convicted on the statute against deer-stealing, there is a penalty of 30*l.* to be levied by distress, and if he has no distress, he is to be put in the pillory; so that if the pillory be infamous, the person convicted (according to this notion) will be so if he has not 30*l.*, but if he has 30*l.* he will not be infamous. Petit larcency is felony: and there is no case where a person convicted thereof was ever admitted to be a witness. 2 *Wilson*, 18.

Of goods. 2. A written will of goods and chattels is not altered as to this matter by the said statute, but continues as it was before.

Concerning which, it is said in 3 *Salk.* 396. that by the canon law, and also by the common law, two witnesses are requisite to prove a will of goods.

For one witness by the civil law, unto which the other laws are conformed in this matter, is as no witness at all. 1 *P. Will.* 13.

So in the case of *Thwaites* and *Smith*, *M.* 1696. Before the delegates. Where there were only three witnesses to the will, and two of them children of the residuary legatee; the will was set aside, children (by reason of the affection and duty which they owe to their parents) not being allowed to be witnesses by the civil law. — But on a commission of review being sued out, the parties agreed, and the executor renounced. And the reporter makes a quære, Whether if the will in question appeared to be written, or so much as subscribed by the testator's own hand, it would not have been good without any witness at all? 1 *P. W.* 13.

And *Swinburn* says, if it be certain and undoubted, that the testament is written or subscribed with the testator's own hand, in this case the testimony of witnesses is not necessary; but if it be doubtful whether the testament were written or subscribed by the testator, in this case the testimony of witnesses is necessary to confirm the same to be the testator's own hand. *Swin.* 353.

And although witnesses to prove the will may be necessary, yet it doth not seem to be of absolute necessity that the names of these witnesses should be by them subscribed to the will.

[106] In the case of *Limbery* against *Mason* and *Hyde*, *T.* 8 *G.* 2., several cases were cited wherein these strict formalities were determined not to be requisite. As in the case of *Wright* and *Walthoe*, *H.* 1710. There were three testamentary schedules, whereof one was without date; the second was written *In witness*, but there was no witness: the third concluded abruptly; yet, being written by the testator, they were declared to be his will. *Comyn*, 452.

So in the case of *Worlick* and *Pollet*, 1711. Before the dele-

gates. The testatrix sent for a person to make her will; gave him instructions for the same; when he had wrote it, he read it to her; she approved it; declared it to be her last will; sent for three witnesses to see her execute it; *Signed and sealed* was written, but she died before any other execution: yet it was held a good will. For though the first sentence for it was reversed upon an appeal, yet it was afterwards affirmed by the delegates. *Comyn*, 452.

And by *Gilbert* chief baron: If a will be made of goods, and written in the party's own hand, without any witness at all, it is allowed to be good, and the statute doth not require any witnesses to chattels only. *Gilb. Rep.* 260.

In the case of *Brown* and *Heath*, 1721. A will of a real and personal estate was prepared in order to be executed, though there were several blanks in it, and the testator died before execution; yet it was held a good will for the personal estate: and though more was intended to be done, yet it shall be good for what is done. *Comyn*, 453.

So in the case of *Loveday* and *Claridge*, 1730. The testator intending to make his will, pulled a paper out of his pocket, wrote down some things with ink, some with a pencil, and though it had no conclusion, but appeared to be a draught which he intended after to finish, for it was not signed, but had at the end a calculation of his effects, an account of his tea table, and an order to pay a dividend of stocks; yet it was held to be a will. *Comyn*, 452.

So in a case where the testator gave instructions to make his will of his real and personal estate; and when it was brought to him, he made several alterations, and then wrote the whole over as altered with his own hand: this being found in his study, though not signed or sealed, was held a good will (as to the personal estate). It is true, the first sentence was, that he died intestate, but that was reversed by the delegates. *Comyn*, 453. (*m*) [107]

(*m*) So also a will made under a power, but not duly attested to pass real estate, was deemed a good execution of the power as to the personalty. *Duff* v. *Dalzell*, 1 *Bro. C. C.* 147.

[So a nuncupative will failed to be established, when minors were concerned, for want of proof of *rogatio testium*, within 29 *Car.* 2. *c.* 3. § 19., which has always been strictly construed. *Bennett* v. *Jackson*, 2 *Phill. Rep.* 190. *Parsons* v. *Miller*, *id.* 194. The act seems to intend that the act should originate with the party: where therefore the words were merely spoken in answer to questions put by persons standing round, the will was pronounced against. *Parsons* v. *Miller*, 2 *Phill. R.* 195.]

[Unexecuted papers,

Many cases might be cited, in which an unexecuted paper has been held to be a good will, as to *personal property*, and others in which it has been decided not to be. The doctrine of the ecclesi-

3. By the same statute of the 22 C. 2. c. 3. All declarations or creations of trusts or confidences, of any lands, tenements, or

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when held testamentary in general.]

astical courts is, *that it is incumbent on the party propounding such a paper, to shew that it was the intention of the deceased to execute it, and that he was prevented so doing by* sudden death *or* indisposition, *which rendered him incompetent to perform any serious or rational act.* The most common case which occurs, is that of a paper disposing of real and personal property, to which is added a clause of attestation, but the names of the witnesses, and the signature of the deceased, are wanting. The presumption of law arising from such a circumstance is, that the deceased had either abandoned his intention of executing the paper, or that he had never fully made up his mind on the subject. It is, however, a presumption, the effect of which may be repelled [see *infra*, this note], by shewing that the deceased was prevented executing it by death, deprivation of understanding, or any other incapacity occasioned by indisposition. The validity, therefore, of a paper of this kind depends on the subsequent establishment of this fact, *viz.* " the intention of the deceased to execute " it," which must necessarily be uncertain; and this accounts for the seeming diversity which appears in the decisions of the ecclesiastical courts in cases of this description. The following cases have been decided with respect to unexecuted papers, some of which were established as valid wills, and the others were held not to be.

Instructions for drawing a will, contained in a letter to an attorney, established as a will.

Catharine Lloyd, an old lady, wrote the following letter, directed to James Browning, Esq., at his chambers, Lincoln's Inn Square.

" I make no doubt Sr if what I am now going to say should be " possible to gain if I shou'd recover this illness & if fesable with my " inquiring & your help without great expence, but that you will " think it worth my while and as I have the real Writings to produce " and shall have more intelligence by a person that is going down " that has an Estate lying near Wooten Pilling that will send me a " line that if such persons as are nominated do possess and reside " their I do hear the Person that I did employ was commanded to see " again as being a very proper man & so great a Call as has been for " He had ben in the King of Prussias sevis and received a Shot " thro his wright arm and by that got his discharge which he shew'd " me — But in case of my demise I desire you will draw up and leave " some Blanks for some small legacies that after my Funeral Charges " are defrayed with decency then except some legacies I give and " bequeath to John Browning, Esqre my dear and well beloved " Cousin my Lands, and Tenements Hereditaments att Wooten " Pilling in the County of Bedford and also a Message and Tene- " ment lying in Bucklersbury near the Mansion House in the City of " London and you by taking possession will find my writings to " prove and also what Stock I shall have remaining in the said John " Browning Esqre Hands — I am

" &c yours
" Cath Lloyd
" This you have under
" my Hand, if any thing
" should happen before the Writing
" is drawn up"

hereditaments, shall be manifested and proved by some writing signed by the party who is by law enabled to declare such trust,

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"If my assits will afford it to pay in the Burow of Southwark
"£ and to Miss July Poney thirty Pounds Isaac Apothecary
"a small debt to Wheeler Baker in S^t Thomas's a small debt to Re-
"mitt a Publican at the Red Lyon near the Church half his debt a
"Poor Milkwoman in Kent Street named Cater 1 " 1 " 0 These all
"by Legacy by way of composition and to Margaret Shaw my Room
"of Goods and Sheets wearing aparell and all my best Linen Velvet
"Cloak & Capuchin & to Mary Burke that is now with me Shifts
"Bedgowns Petticoats & £5. if she is with me at my departure—
"To M^rs Barnardi 30 Shillings for a Ring and to your little Girl a
"little Cabinet & my Garnet Ring set with Diamonds & a large Table
"Spoons but please not put this Rigmaroll in it till I send it correct—
"This only by way of Memorandum in case I should go off suddenly
"—Mary Skee something for she has used me ill."

This paper was written March, 1760. Mrs. Lloyd died on the 2d of August in the same year.

The prerogative court pronounced against this paper, as being a conditional paper: the operation of it depending on the testatrix dying suddenly; whereas she had time to make a formal will; and parol evidence was admitted.

The court of delegates, Judges *Ashhurst* and *Nares*, Sir *James Marriot*, Dr. *Macham*, and Dr. *Bever*, reversed the sentence; and pronounced for the paper as the last will and testament of the deceased; thinking it a perfect paper and an absolute disposition. *Habberfield* v. *Browning*, 4 *Ves. jun.* 200. *n.*

[Instructions for wills in general.]

[There have been cases where a paper written in the life-time, but not in the presence of the testator, or read over to him, has been established; but in general they have been cases perfectly clear, both as to the intention of the deceased conveyed by his instructions, and as to the paper being exactly conformable to such clear and decided intentions. The court has always acted in such cases with extreme caution; and in *Wood* v. *Wood*, 1 *Phill. R.* 357—374., rejected such a paper, and struck out a clause written after the deceased's death. *Ibid.*

In *Sikes and another* v. *Snaith*, 2 *Phill. R.* 351., instructions committed to writing during testator's lifetime, but not seen by, or read over to him, were admitted to proof, on evidence of a sudden attack which rendered him till his death incapable of any rational act. In *Huntington* v. *Huntington*, 2 *Phill. R.* 213., instructions dictated by, and reduced into writing in the presence of testator, were established as a will, where he was prevented by the act of God from executing the fair copy; and see the cases cited 1 *Phill. R.* 370. In *Lewis* v. *Lewis*, 3 *Phill. R.* 109., instructions for a codicil given to a third person, who was to send them to a solicitor to draw the codicil, were admitted to probate, the testatrix having been prevented by the act of God from executing the intended codicil, which was prepared in her lifetime and brought to her for execution.

The validity of instructions, when propounded as a will, will be in some degree elucidated by Sir *John Nicholl*'s observations in *Wood* v. *Wood*, 1 *Phill. R.* 364, 365. Taking up that case at the time when

or by his last will in writing; or else they shall be utterly void, and of none effect. § 7.

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the deceased's solicitor, clerk, and executor left his room with instructions for his will, he says, "Suppose then the deceased had been "struck with sudden death the moment these persons left the room. "—Here was the deceased himself of his own accord, sending for "his solicitor to make his will; in possession of full capacity; dic-"tating instructions; these instructions reduced into writing; read "over, approved by him; containing a full disposition of his property; "no doubt or hesitation of his intention; his friends round him; no "supposition of any improper influence; and the solicitor carrying "away the instructions to prepare a will as expeditiously as pos-"sible from them; but before he could prepare the will, the de-"ceased became incapable by the act of God, and died the next "morning. If the case had rested here, the court could not, pro-"ceeding according to its ordinary rules, have hesitated in pro-"nouncing for this paper." He goes on to state that the question in that case then was, "Whether any thing happened afterwards "either to add to or to take from this paper: and the more clear, "distinct, and deliberate the intention was at this time, the more "clear should be the proof of any subsequent alteration."

In *Devereux* v. *Bullock*, 1 *Phill. R.* 72., Sir *John Nicholl* observed, that an incomplete paper of instructions may be established by circumstances; but for this, said he, "two points are absolutely neces-"sary: "*First*, the court must be completely satisfied that the "deceased had finally decided to give these legacies; *Secondly*, "that he never abandoned that intention, but was only prevented "by the act of God from proceeding to the completion of his will." In that case, a few first instructions not conformable to any former dispositions, nor precisely supported by any recent declarations, were held not entitled to probate.

When instructions for a will are given by a party, not being the proposed testator,—*à fortiori*, when by an interested party; it is the bounden duty of solicitors to satisfy themselves thoroughly, either in person or by some confidential agent, that the instrument expresses the real testamentary intentions of a capable testator, prior to its being executed *de facto* as a will at all. 1 *Add. Rep.* 48.]

[A will disposing both of real and personal property, *with a clause of attestation*; *but no witnesses*, established as to the personal property.]

James Savage, deceased, gave instructions to his attorney to prepare a will for him. The attorney prepared it with several *quæres* and abbreviations; and the deceased made several alterations and interlineations in the draft. He afterwards with his own hand wrote the said will over fair from the said draft; adding only a bequest of the residue, which he had not made in the draft; and he concluded as follows:

"In witness whereof I have to this my last Will and Testament "contained in Three Sheets of Paper, to the first two whereof I "have set my Hand and the last my Hand and Seal this "in the 16 Year of the Reign of our Sovereign George the Third of "Great Britain France and Ireland King defender of the faith and "in the year of our Lord One Thousand Seven hundred and Seventy "Seven JAM. SAVAGE. Signed sealed published declared and

And all grants and assignments of any trust or confidence, shall likewise be in writing, signed by the party granting or as-

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" delivered by the testator JAMES SAVAGE as and for his last Will " and Testament in the presence of us who have at his Request and " in presence of each other set our names as Witnesses Hereto."

The deceased had subscribed his name to each sheet; and to the last sheet he did affix his seal. The clause of attestation was not subscribed by any witnesses.

The paper was considered imperfect by Dr. *Calvert* on account of the clause of attestation not being witnessed; and he admitted parol evidence; on which he set aside the paper.

The delegates, Judge *Ashhurst*, Baron *Hotham*, and Dr. *Macham*, were of opinion, that, it being a will both of real and personal property, it was *reddendo singula singulis* a perfect disposition of personal estate, and therefore a good will; and they rejected parol testimony against it. *Cobbold* v. *Baas*, 4 *Ves*. 200. *n*.

[Where there are no witnesses to an attestation clause in a will of personalty, the presumption of law is, that the deceased intended to do some further act; but the presumption is slight, and may be repelled either by circumstances to shew that he intended it to operate in its present form, or that he was prevented from finishing it by the act of God. Thus, in *Harris* v. *Bedford*, 2 *Phill. Rep*. 177., a will written throughout in testator's own hand, and signed by him, but without witnesses to an attestation clause therein, was established. So in *Thomas* v. *Wall and others*, 3 *Phill. Rep*. 23., a codicil in testator's hand-writing, unsigned, and having an attestation clause, to which there were no witnesses, was admitted to probate. See *Carstairs* v. *Pottle*, 2 *Phill. Rep*. 30. But the adverse presumption, though slight, *must* be rebutted by some extrinsic circumstances, in order to pronouncing for the paper. *Beaty* v. *Beaty*, 1 *Add. Rep*. 154. *Matthews* v. *Warner*, 4 *Ves. jun*. 186. 211. *acc*.]

[An unfinished testamentary paper of no effect; the party having lived eight days afterwards.]

Richard Griffin executed a testamentary paper, dated the 27th of September 1777.

On the 18th of January 1789, he began a paper; and having written no more than the commencement of what he meant to do, he was called away to dinner, and locked up the paper. On the 27th of the same month he died suddenly, while sitting on the bench as a justice of peace.

The questions were, whether this unfinished paper was a revocation of the former paper, executed in 1777; or, whether it was to be established substantively and conjunctively with the former paper.

It was determined that the unfinished paper could have no effect; the testator having lived eight days in health, and capable of business, after he had begun that paper, and not having concluded it, the presumption of law, even if there was no other paper, would have been, that he never meant to finish it; or that it was intended only as a draft for consideration; and the case was still stronger, as there was an executed paper. *Griffin* v. *Griffin*, 4 *Ves. jun*. 197. *n*. [And see *Disney* v. *Disney*, *M. T*. 1789. *MSS. Cas*. 99.

Where there is a regular will, and another paper begun as a new will, which testator has been prevented by the act of God from com-

signing the same by such last will or devise; or else shall be utterly void and of none effect. § 9.

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pleting, the two papers may be taken together as his will, and operation *pro tanto* may be given to the latter, provided the proof of *final intention* be clear: but it will not wholly revoke the former will: thus an unfinished paper failed to be established as codicillary, where it went to control a will regularly executed a short time before, no proof being given that testator was prevented by the act of God from duly executing it. *Carstairs* v. *Pottle*, 2 *Phill. Rep.* 30. Unfinished instructions, where there is a complete will, only revoke it as far as they go: they are not a codicil to be taken in addition to the will, but to be taken in conjunction with it. *Ingram* v. *Strong and others*, 2 *Phill. Rep.* 312. A legacy by a complete will is superseded and revoked by an incomplete instrument, intended as the inception of a new will, but not completed. *Ibid.* A testamentary paper which is neither a *finished will* in itself, nor proved to have been such in the deceased's apprehension of it, is of no effect where the deceased had full time and opportunity, if he had thought proper, to have rendered it a finished will. *Roose* v. *Monsdale*, 1 *Add. Rep.* 129.]

An unexecuted paper established as a will by the prerogative court, sentence affirmed by the court of delegates; a commission of review afterwards granted, and the sentence reversed.

Matthews v. *Warner*, *M.* 39 *G.* 3. William Matthews, late principal storekeeper of his majesty's dock-yard at Deptford, died on the 8th of April 1790, about the age of eighty, leaving the following testamentary papers:

"2d Novr. 1785. A Plan of a Will proposed to be drawn out as "the last Testament of William Matthews, Storekeeper of His Majys "Yard at Deptford — After the usual Prelude, being in Health, "sound of Mind, &c. IMPRIMIS I give unto Miss Issabella Johnson, "Daughter of my good Friend Edwd Johnson, Esq; of the Lottery "Office, the Sum of Sixty Pounds pr Ann. for her natural Life, to "be paid her Half-yearly, out of the Dividends arising for Interest "of the several Navy Bills I have lately subscribed in the 5 pr Cts "and Twenty Pounds for Mourning, and also One Hundred Pounds "to my aforesaid good Friend Mr Johnson, if I die before him. "After the Death of Miss Johnson, the Capital, with what other the "5 pr Ct Stock I may have, I bequeath to Holland Ann L'Epine "and Maria L'Epine, Sisters, Daughters of my good Friend Edwd "L'Epine, Esq; in an equal Division between them, and if one dies "unmarried, the whole to descend to the Survivor, and if both die "unmarried, or without Children, to descend to the children of my "First Cousin John Fisher Clerk, formerly of Bodmyn, Cornwall, "and to my First Cousin Timothy Slade of Ledbury, to be divided "equal between them. My Household Goods to be sold in Part, "unless sufficient Monies can be found to pay my Debts and Le-"gacies. My Plate, and what they choose to save of my Household "Goods, I bequeath to Holland Ann L'Epine and her Sister Maria, "to be divided between them; to whom I also leave all the Residue "of my Fortune or Effects, after giving One Hundred Pounds to my "good Friend Mr L'Epine, and also One Hundred Pounds to my "late Son-in-Law Isaac Warner. Must pray my burial may be very "plain and not expensive; could like to be buried, with the Warners' "Permission, with my dear Girl, in their Vault. Leigh Church, but

4. A nuncupative testament is, when the testator without any writing doth declare his will, before a sufficient number of witnesses. *Swin.* 58. Nuncupative will.

"by no Means to be buried at the Old Church, Deptford. I appoint "my good Friend Mr Edwd L'Epine and my good friend Mr Edwd "Johnson, my Executors, to see this my last Will and Testament "complied with. Dated at Deptford, 2d Octr. 1785.

"Wm Matthews.

"I must not forget my good
"Friends Miss Mary and Miss
"Charlotte Howell, who desire
"will accept of
"Five Guineas each for Ring to wear in Remembrance of me:
"6th Octr 1785. Wm Matthews."

This paper was indorsed thus:
"2d Octr 1785
"A Plan designed for the last
"Will and Testament of
"Willm Matthews, Store-
"keeper of His Majys
"Yard,
"Deptford."

The other paper was as follows:
"27th Decr. 1789.

"Finding myself in a very precarious State of Health, the following "is the Plan I propose to dray Will from, abrogating all the others "I have already drawn out. Imprimis, I give to Miss Isabella and "Catherine Jones, both of Eltham, One Thousand Pounds 5 pr "Cents. to be divided between them equally, being a legacy I "always intended for their Aunt Isabella Johnson, for her great "Friendship of her's and her father's always shewed towards me; to "Mrs. Jones the Mother of the young Ladies, I bequeath One "Hundd 5 pr Cts; to Isaac Warner, my late Son-in-Law, One Hun-"dred; to Matthew, his Son and my Godson, One Hundred I give "to Mr. John Clewer at Botley, and "

The former of these papers was written on a piece of official paper intersected with lines, containing printed at the top the different articles, of which the deceased in his situation of storekeeper had the care; and the latter was on the back of a letter addressed to the deceased.

Both of them were in the hand-writing of the deceased. The former was found in the deceased's office in the dock yard, loose in his desk, in which there also appeared some official papers: the latter was found in the deceased's bureau in the parlour of his dwelling-house, in the dock-yard, in a bundle of letters and papers.

Caveats were entered on the part of several persons, claiming as next of kin to the deceased, and of others, claiming as legatees under these instruments; and a suit was instituted in the prerogative court of Canterbury.

On the 8th of July 1793, the judge of the prerogative court, Sir *William Wynne*, pronounced against the validity of the paper dated

By the aforesaid statute, 29 *C.* 2. *c.* 3. No *nuncupative will* shall be good, where the estate thereby bequeathed shall exceed

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the 27th of December 1789, and for the validity of the paper dated the 2d of October 1785, and of the codicil thereto, dated the 6th of that month.

Upon an appeal to the court of delegates (*Buller* and *Heath* justices, Drs. *Swabey*, *Cooke*, and *Parson*) on behalf of Richard Matthews, one of the next of kin of the deceased, from that part of the sentence which established the will and codicil dated the 2d and 6th of October 1785, the sentence was affirmed on the 10th of May 1798.

A petition was presented to the king in council, on the part of the appellant, praying a commission of review; and by an order of council, dated the 31st of October 1798, the petition was referred to the lord chancellor to report his opinion thereupon.

The commission of review was granted; and the former sentence of the court of delegates was reversed: and it was pronounced that the deceased had died intestate. 4 *Ves. jun.* 186. *et seq.*

[Unfinished and unexecuted papers, when established as testamentary.]

[Unfinished and unexecuted papers are established whenever it is shewn that it was the intention of the deceased, continued to the latest moment of his existence, that they should operate; and this even in cases where the most regular wills have been found entire and uncancelled: for parol evidence is here introduced, not to revoke a written will, but to shew whether another paper is a will or not: and the case is not within 29 *Car.* 2. *c.* 3. § 22.; which see *infra*, p. 197. *Helyar* v. *Helyar*, 1 *Phill. Rep.* 430.; and see *Read* v. *Phillips*, 2 *id.* 122. Thus in *Scott* v. *Rhodes*, 1 *Phill. Rep.* 12., an unfinished and unexecuted paper was established as a will where a long continuance of according intentions was proved, and the deceased was prevented from completing it by the act of God. Again, where blanks were left for the names of an executrix and residuary legatee, parol evidence of testator's intention was admitted. *Gerard* v. *Gerard*, *Prer.* 1789. *MSS. Cas.* 178. A paper, indorsed "Heads of the will of W. S.," dated, subscribed, and containing a complete disposition, is imperfect as a will; but alterations having been afterwards made in it with ink, in a formal manner, and another paper containing a calculation of his property, and enumerating legacies conformable to the will being propounded from the proper custody, coupled with the declaration of the deceased, that he had written and signed the "heads," and that *it would do very well*, but that he would make it more formally, which he was prevented from doing by death, were established as a will. *Bone and another* v. *Spear*, 1 *Phill. Rep.* 345. A will without date or signature was established in *Friswell* v. *Moore*, 3 *Phill. Rep.* 135. Various instruments not exactly in the form of a will, letters, deeds of gift, marriage settlements, have been held to be testamentary, if the court has been satisfied as to the intention of the testator. It has been sufficient if they have contained directions how property should be disposed of in the event of death; nor has it been held necessary that they should be in direct and imperative terms: wishes and requests have been deemed sufficient. The court must judge from the form of the paper, — from its nature, contents, and appearance, — whether it was written and intended as a formal

the value of thirty pounds, that is not proved *by the oaths of three witnesses at the least*, that were present at the making thereof; nor unless it be proved *that the testator* at the time of pronouncing the same *did bid the persons present or some of them bear witness*

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permanent will, which it must be presumed the deceased meant should operate, unless some act was done to revoke it; or, whether it was a deliberative and temporary paper, which expressed the impression and wishes of the moment, and was never afterwards thought of or adverted to. In the latter case, it can only be established by the aid of extrinsic circumstances. This principle (adds Sir *J. Nicholl*) I apprehend was recognized, restored, and re-established by the court of review in the case of *Matthews* v. *Warner*, 4 *Ves. jun.* p. 186. *Passmore* v. *Passmore*, 1 *Phill. Rep.* 218.

[What instruments, documents, &c. *may* have testamentary effect.]

An instrument, purporting to be a deed of gift after the maker's death, was held to be a will. *Thorold* v. *Thorold*, 1 *Phill. Rep.* 1. and other cases *in notis*. But a void deed of covenant to stand seised to uses, being unsealed, shall not operate as a will, nor as a revocation of any former will. *Wright d. Clymer* v. *Litter*, 3 *Burr. Rep.* 1244. 1 *Bla. Rep.* 345. S.C. A recognition establishes testamentary papers which were conditional in their terms; and on this principle, in *Strauss* v. *Schmidt*, 3 *Phill. Rep.* 209., testamentary effect was given to three *letters*. Alterations in pencil, in a regularly executed and attested will, were admitted to probate, where consonant with the testator's possible intentions, and where there was nothing from which it could be inferred that the deceased intended to do something more. *Dickenson* v. *Dickenson*, 2 *Phill. Rep.* 173. 178.

[Separate papers making a will.]

In order to establish several papers as a will, the court must be satisfied of the intention of the deceased that all of them should compose it. *Sanford* v. *Vaughan and others*, 1 *Phill. Rep.* 39. 148. 128. Where three papers were propounded, and it appeared that the deceased was in habits of writing her will at different times, and of signing her name whenever she ceased writing, parol evidence as to her intention was admitted, under which the last, though dated and signed, was held so far unfinished as not totally to revoke the two former, and the three were held to contain a will together. *Harley* v. *Bagshaw*, 2 *Phill. Rep.* 48.

[Execution of wills of goods in general.]

A testament of chattels, written in testator's own hand, though it hath neither his name nor seal to it, nor witnesses present at its publication, is good, provided sufficient proof can be had that it is his hand-writing. And though written in another man's hand, and never signed by testator, yet, if proved to be according to his instructions, and approved by him, it hath been held a good testament of the personal estate; yet it is the safer and more prudent way, and leaves less in the breast of the ecclesiastical judge, if it be signed or sealed by the testator, and published in the presence of witnesses. 2 *Bl. Com.* 501. In *Ross* v. *Ewer*, 3 *Atk.* 162., it was said, that nothing required so little solemnity as the making a will of personal estate according to the ecclesiastical laws of this realm; for there is scarcely any paper writing which they will not admit as such.]

that such was his will, or to that effect; nor unless such nuncupative will were made in the time of the last sickness of the deceased, and in the house of his habitation or dwelling, or where he hath been resident for the space of ten days or more before the making of such will, except where such person was surprised or taken sick, being from his own home, and died before he returned to the place of his dwelling. § 19.

And after six months passed after the speaking of the pretended testamentary words, no testimony shall be received to prove any will nuncupative, except the said testimony, or the substance thereof, were committed to writing within six days after the making of the said will. § 20.

And no *letters testamentary or probate of any nuncupative will* shall pass the seal of any court, till fourteen days at the least after the decease of the testator be fully expired; nor shall any nuncupative will be at any time received to be proved unless process have first issued to call in the widow or next of kindred to the deceased, to the end they may contest the same if they please. § 21.

Provided that notwithstanding this act, any soldier being in actual military service, or any mariner or seaman being at sea,
[108] may dispose of his moveables, wages, and personal estate, as he might have done before the making of this act. § 23.

And by *stat.* 4 *An. c.* 16. All such witnesses as are and ought to be allowed to be good witnesses upon trials at law, by the laws and customs of this realm, shall be deemed good witnesses to prove any nuncupative will, or any thing relating thereunto. § 14.

§ 19. *By the oaths of three witnesses at the least*] *T.* 1704. *Phillips* and *the Parish of St. Clement Danes.* Dr. Shallmer by will in writing gave 200*l.* to the parish of St. Clement Danes; and after Prew the reader coming to pray with him, his wife put him in mind to give 200*l.* more towards the charges of building their church; at which, though Dr. Shallmer was at first disturbed, yet afterwards he said he would give it, and bid Prew take notice of it; and the next day bid Prew remember what he had said to him the day before, and dies that day. Within three or four days after, the doctor's widow put down a memorandum in writing of the said last devise, and so did her maid. Prew died about a month after; and amongst his papers was found a memorandum of his own writing, dated three weeks after the doctor's death, of what the doctor said to him about the 200*l.*, and purporting that he had put it in writing the same day it was spoken; but that writing which was mentioned to be made the same day it was spoken, did not appear: and these memorandums did not expressly agree. About a year after, on

application of the parish to the commissioners of charitable uses, and producing these memorandums and proofs by Mrs. Shallmer and her maid, they decreed the 200*l.* But on exception taken by the executors, the decree was discharged of this 200*l.*; and the lord chancellor held it not good, because it was not proved by the oath of three witnesses: for though Mrs. Shallmer and her maid had made proof, yet Prew was dead; and the statutes in that branch requires not only three to be present, but that the proof shall be by the oath of three witnesses. 1 *Abr. Cas. Eq.* 404.

Letters testamentary or probate of any nuncupative will] *H.* 22 & 23 *C.* 2. *Verhorn* and *Brewin.* An administrator brought a bill to discover and have an account of the intestate's estate; the defendant pleaded, that the supposed intestate made a nuncupative will, and another person executor, to whom he was accountable, and not to the plaintiff as administrator. But decreed, that though there was such a nuncupative will, yet it was not pleadable against an administrator before it was proved. 1 *Chan. Cas.* 192.

5. A *Codicil* (8), by intendment of law, is either to alter, explain, add, or subtract something from the will; and wherever it is added to a testament, and the testator declares that it shall be in force; in such case, if the will happens to be void for want of those solemnities required by law, yet it shall be good as a codicil, and be observed by the administrator: it is true, executors cannot regularly be appointed in a codicil, but yet they may be substituted according to the will of the testator, and the codicil is still good. *Swin.* 14. [109] Codicil.

M. 31 *C.* 2. *Stoniwell's* case. The testator made his wife executrix and residuary legatee; but she dying in his lifetime, he by a codicil nuncupative devised to G. R. all which by will he had given to his wife, and died. The question was, whether this nuncupative codicil was good, notwithstanding the statute before mentioned; and adjudged that it was, and, as it were, a new will for so much as he had given to his wife, and that it did not alter his written will, for there was no such will, the operation of it being determined by the death of the wife, living the testator, who was her husband. *Raym.* 334.

Although no man can die with two testaments, because the latter doth alway infringe the former; yet a man may die with

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(8) *Codicillus,* a little book or writing, is a supplement to a will, or an addition made by the testator, and annexed to and to be taken as part of a testament, being for its explanation or alteration, or to make some addition to, or else some subtraction from, the former dispositions of the testator. *Godolph.* p. 1. c. 1. § 3.

divers codicils, and the latter doth not hinder the former, so long as they be not contrary. *Swin.* 15. (*n*)

If two testaments be found, and it doth not appear which was the former or latter, both testaments are void; but if two codicils be found, and it cannot be known which was first or last, and one and the same thing is given to one person in one codicil, and to another person in another codicil; the codicils are not void, but the persons therein named ought to divide the thing betwixt them. *Swin.* 15.

If codicils are regularly executed and attested, they may be proved as wills are. So if they are found written by the testator himself, they ought to be taken as part of the will, and to be proved in common form by the oath of the administrator, with the will annexed; and in case of opposition, by witnesses to the hand-writing and finding: And it hath been usual to exhibit an affidavit of the hand-writing and finding, before a probate or administration passes even in common form.

But in case of a real estate, a codicil cannot operate, unless it be executed according to the statute. [*Heather* v. *Rider*,] 1 *Atk.* 426. [*Gallini* v. *Noble*, 3 *Meriv. Rep.* 691.]

[But an unattested paper clearly referred to in a devise of real estate, has been considered part of the will, if previously and not subsequently made. (9)

[Effect of codicil in republishing will and passing after acquired

As a codicil to a will republishes it (1), so it consequently revokes any intermediate will. (2) In this last case sir *John Nicholl* said " A codicil even of personalty, if executed so as to act on the subject, that is, if attested by three witnesses, republishes a will of lands. (3) So that a will of personalty, or *a for-*

(*n*) All codicils are part of the will. Therefore a codicil merely for a particular purpose, as to change an executor, and confirming the will in all other respects, does not revive a part of the will revoked by a former codicil. [So, where there are two inconsistent wills, a codicil referring to the first by date, as the *last* will, cancels the intermediate will, and evidence of a mistake cannot be admitted.] *Crosbie* v. *M'Doual*, 4 *Ves.* 610. [616. *Parker* v. *Biscoe*, 3 *B. Moore's Rep.* 24. S. P.]

(9) *Wilkinson* v. *Adam*, *E.* 1813, 1 *V. & B.* 422. 445.

(1) First held in *Carte* v. *Carte*, 1744, 3 *Atk.* 174. 180. *Amb.* 28.; the point having been left undecided in *Alford* v. *Earle*, *H.* 1690, 2 *Vern. Rep.* 209.: and see *Jansen* v. *Jansen*, 1 *Add. Rep.* 38., and cases collected by *Bridgman* in his *Digest*, tit. *Will*, &c. IV.

(2) *Browning* v. *Pittis*, 1 *Add. Rep.* 30. 37.

(3) *Acherley* v. *Vernon*, 9 *Mod.* 68. 3 *Bro. P. C.* 107. *Powell* v. *Clever*, 2 *Bro. C. C.* 511. And thus passes lands bought in the interval, though no intention of republishing the will is expressed in the codicil (*Pigott* v. *Waller*, 7 *Ves.* 98. *Holmes* v. *Coghill*, 7 *Ves.* 499. *Barnes* v. *Crow*, 4 *Bro. C. C.* 2. 1 *Ves. jun.* 486. S. P.), establishing

tiori, a mixed will, so far as respects personalty, is republished by a codicil, whether so attested or not. No evidence of intention to republish is requisite in either case; the very act of making the codicil, *primâ facie* at least, infers the intention. It is true, indeed, that this *primâ facie* inference may be rebutted, by proof that the act was done by the deceased in error or obtained from him by fraud. *Primâ facie*, however, the making of a codicil to a will as much republishes that will as a will is revoked, *primâ facie*, by its cancellation; and as a new will, *primâ facie*, annuls and makes void any will of a prior date." lands, &c. (see *ante*, 76. *note*.)]

[What document may be held to be a codicil.]

It is no conclusive objection against a codicil, that it is in the form of a letter. 1 *Phill. R.* 218. And in *Denny* v. *Barton and another*, 2 *Phill. R.* 575., a letter was established as a codicil to a will of a subsequent date, where it was intended as a confidential trust, not to be communicated to the person to whom it was addressed till after the testator's death, and to operate independently of his will: and was therefore not affected by the general clause therein, which revoked all former wills.

[Codicil, how revoked.]

A codicil is virtually revoked by another codicil of subsequent date, though without express words of revocation, if the intention to revoke is clearly proved. The whole question in a court of probate is one of intention, and is completely open to investigation. *Methuen* v. *Methuen*, 2 *Phill. R.* 416.

[What documents have failed to be established as codicillary.]

A letter, written on the eve of sailing to the East Indies, failed to be established as a codicil to a regular will, on proof that the writer returned, lived many years after, and never recognized it as a permanent disposition of his property; for the presumption against it, as an incomplete paper, is not repelled. *Passmore* v. *Passmore*, 1 *Phill. R.* 216.

Acherley v. *Vernon*, notwithstanding lord *Camden*'s opinion to the contrary in *Atto. Gen.* v. *Downing*, *Ambl. Rep.* 57. Thus, also, the words "*legacy*" or "*personal estate*" may be applied to a real estate, if the context of the will shews that such was the devisor's intention. *Hardacre* v. *Nash*, 5 *T. Rep.* 716. *Doe d. Tofield* v. *Tofield*, 11 *East. Rep.* 246. But it seems, from *Goodtitle* d. *Woodhouse* v. *Meredith*, 2 *M. & S. Rep.* 5. *Lady Strathmore* v. *Bowes*, 7 *T. Rep.* 482. *Hulme* v. *Heygate*, 1 *Meriv. Rep.* 285., that if it appear on the face of the codicil that it was not the testator's intention to pass any other lands than those devised by the will, it would be a contradiction to make the codicil pass after-purchased lands. In *Parker* v. *Biscoe*, 3 *B. Moore's Rep.* 24., the codicil was held incompetent to have this effect, because it was restricted to a particular purpose. See other cases, where, owing to a latent ambiguity, codicils have been held not to operate as republication, so as to pass after-purchased property, *Simpson* v. *Hornsby*, *Pre. Cha.* 441. 2 *Vern. Rep.* 772. *Strode* v. *Falkland*, 2 *Vern. Rep.* 625. *Drinkwater* v. *Falconer*, 2 *Ves.* 626. *Steed* v. *Berries*, 1 *Vent.* 341. 2 *Mod.* 313.

In *Brouncker and Cooke* v. *Brouncker*, 2 *Phill. R.* 57., probate was refused to a codicil, which, by doubling the provision made for younger children in a will dated but four days before, left no assets for the annuity given to the widow by that will, and left the eldest son destitute; proof being given of the weakness and agitation of the deceased and his friends attending him.]

[110] *Donatio causâ mortis.* 6. *Donatio câusa mortis*, or a gift in prospect of death, is where a man moved with the consideration of his mortality, doth give and deliver something to another, to be his in case the giver die, but if he lives he is to have it again. *Law of Test.* 179. *Prec. Cha.* 269. (*o*)

In every such gift there must be a delivery made by the party in his last sickness (*p*): and nothing can operate as such, without having been delivered in the testator's lifetime, by him or his order. *Miller* v. *Miller*, 3 *P. Will.* 357.

A man by his will disposed of personal estate; and afterwards by parol gave 100*l.* bill to one to deliver over to his nephew, if the testator should die of that sickness: And this gift was held good. *Drury* and *Smith*, 1 *P. Will.* 404.

So where the husband upon his death-bed delivered to his wife a purse of 100 guineas, bidding her apply it to no other use than her own. *Lawson* and *Lawson*, 1 *P. Will.* 441. (4)

(*o*) [*Hedges* v. *Hedges*. S. C. *Gilb. Eq. Rep.* 12. 2 *Vern.* 615.] This is the strict and proper definition of a *donatio mortis causâ*, given by *Justinian* in the *Institutes*. *Lib.* 2 *tit.* 7. § 1. Who adds, that the nature of the gift is, that the donor should rather have the thing than the donee; but that the donee should rather have it than the heir. For the difference between an absolute gift and one in contemplation of death, see *Tate* v. *Hilbert*, 2 *Ves. jun.* 111., [and 4 *Bro. C. C.* 286. S. C.; where it was held, that a check or promissory note given by testator in his last illness, are revoked by his death, and are not a good *donatio*, &c. unless reduced into possession by being offered for payment in his lifetime. *Bibby* v. *Coulter*, *T.* 1791, in Irish exchequer, *Ridgw. Ca. temp. Hardw.* 206. *n.*, is *contra*.]

(*p*) A *donatio mortis causâ* may subsist, although the donor afterwards make a testament, without mentioning the gift. *Hill* v. *Chapman*, 2 *Bro. C. C.* 612. [But this depends on the circumstances of intention relating to such will. *Jones* v. *Selby*, *Pre. Ch.* 300.]

(4) For otherwise one could not give to his own wife. *Ibid.* So in *Miller* v. *Miller*, 3 *P. Wms* 356., where a man having by will given his wife an annuity, and also 600*l.* in money, *on his death bed*, desired his servant to deliver to her then present two bank notes, payable to bearer, amounting to 600*l.*, saying, "he had not done enough for her." This gift was held additional, and a valid donation, and is not to be construed a payment of the former legacy in testator's lifetime. But where a gift by a husband to his wife, *some short time before his death*, was set up as a *donatio causâ mortis*, it cannot be established without clear and satisfactory evidence of an intention on the part of the hus-

So where the husband upon his death-bed drew a bill on his goldsmith, to pay his wife 100*l.* for mourning. *Lawson* and *Lawson*, 1 *P. Will.* 441. (5)

Mar. 11. 1744; *Bailey* and *Snelgrove*. Mrs. Bailey going out of town in a bad state of health, gave her maid a *bond* executed to her by a third person; saying, If I die, it is yours. She died intestate. The administrator brought a bill to have the bond delivered up. But by the lord chancellor *Hardwicke*: This is a a sufficient *donatio causâ mortis* to pass the equitable interest of this bond upon the intestate's death. (*q*) The question in this [111] case was, whether the nature of the property was capable of being so given: His lordship held it might, as well as a specific chattel; though no legal property passed thereby, nothing but the paper, a bond being evidence of a debt; and the intent being to give the debt, not the paper, he held it a good donation *mortis causâ*, comparing it to the property which passes by assignment of a bond, which passes nothing in point of law, and the assignee must make use of the other's name for recovering on it. He put the case, that if a chattel in possession had been bought by the intestate, and a bill of sale made to a trustee for her use; the property would have been in the trustee, and the equitable interest in the *cestuy que trust*, who, if she had given this chattel so circumstanced to the defendant, it would have been good. 3 *Atk.* 214. 2 *Vez.* 432. (6)

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band to divest himself of the property, and to hold it as trustee for his wife. *Walter* v. *Hodge*, *T.* 1818. 2 *Swanst. Rep.* 97. 1 *Wils. Ch. R.* 445. Gifts of this sort must be fully proved in all their circumstances. S. C.; and *Jones* v. *Selby*, *Pre. Ch.* 300.

(5) For the bill was held to operate as an appointment, and to amount to a direction to his executors to pay her so much; but the peculiar circumstances of this case seem to have decided this latter part of it. For in general there can be no *donatio mortis causâ* of *choses en action*, because in their nature incapable of actual delivery. *Tate* v. *Hilbert*, 2 *Ves. jun.* 111. 4 *Bro. C. C.* 286. *Miller* v. *Miller*, 3 *P. Wms.* 356.

(*q*) Ruled *contra* by Sir *Joseph Jekyl*, M. R., as to a note for 100*l.*, it being a *chose en action*. *Miller* v. *Miller*, 3 *P. Wms.* 356. [S. P. in *Tate* v. *Hilbert*, *E.* 1793, *supra*, *note* (*o*).] How far a *chose en action* may be willed, vid. *supra*, *Of what things*, 9.

(6) S. C. *Ridgw. Ca. temp. Hardw.* 202. In *Ward* v. *Turner*, 2 *Ves.* 442., lord *Hardwicke* distinguished this case from that of a *note*, in that by delivery of a bond some property is conveyed, and the law allows a bond a locality: and in *Gardner* v. *Parker*, 3 *Madd.* 184. this decision was followed with leave to sue on the bond in the executor's names, on condition of indemnifying them. But in *Chapman* v. *Hart*, 1 *Ves.* 273. *Moore* v. *Moore*, 1 *Bro. C. C.* 127., it was said, that bonds, as a species of *choses en action*, admit of no locality; and therefore a bequest of goods and chattels in a particular place will not pass bonds which happen to be there at testator's death. So by be-

But in the case of *Ward* and *Turner*, July 20, 1752; it was held by lord *Hardwicke*, that a delivery of *receipts for South Sea annuities* was not sufficient (though there was strong evidence of the intent); and that it could not be done without a transfer, or something amounting to that; and all the anxious provisions of the statute of frauds will signify nothing, if donation or stock, attended only by delivery of the paper, is allowed. It might be supported to the extent of any given value, and would leave these things under the greatest degree of uncertainty, and amount to a repeal of that useful law as to all this part of the property of the subjects of this kingdom. Therefore, notwithstanding the strong evidence of the intent, the gift of annuities is not sufficiently made within the rules of the authorities. And considering how much of the personal estate of this kingdom is now vested in stocks and funds, his lordship said he was of opinion not to carry it further. 2 *Vesey*, 431. (7)

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quest of " all testator's goods," a bond passes; for it is *bona mobilia*. 1 *P. Wms.* 267. And see *Fleming* v. *Brooke*, 1 *Sch. & Lef.* 318.; and see 169 *note*. See *Ryal* v. *Rolle*, 1 *Atk.* 171. 1 *Ves.* 362. *Semble*, That a delivery up by obligee to obligor of mortgage deeds, and of *a bond* given at the time of the mortgage for the purpose of releasing or acquitting the debt, in case the obligee should not recover from her then illness, is an effectual *donatio mortis causâ;* but there being contradictory evidence, whether the deeds and the bond were given up at the same time, an issue was directed to try whether or not they were delivered up for the purpose of releasing the debt in case she did not recover. *Hurst* v. *Beach*, 5 *Madd. Rep.* 351. But it does not seem settled whether a mortgage debt can be relinquished by parol as a mere gift *inter vivos*. In *Richards* v. *Syms*, *Barnardist*, *R.* 90., cited 2 *Ves.* 436., lord *Hardwicke* held, that a gift of a mortgage to a mortgagor, by giving him the deeds, if that fact was proved, was a gift of all the money due on the securities, and was not within the statute of frauds. This authority was passed over by lord *Hardwicke* himself in *Hassell* v. *Tynte*, *Ambl.* 318., in which, as well as in *Bryson* v. *Brownrigg*, 9 *Ves.* 1., the question was not decided, and was again declared doubtful by lord *Eldon* in *Monkhouse* v. *Corporation of Bedford*, 17 *Ves.* 380. But, whatever may be the case where the deeds (the *security* for the debt) are found in a third person's hands, yet it would seem that, as between mortgagor and mortgagee, full proof that the latter had himself delivered them to the mortgagor, accompanied by *the bond* which constitutes the debt, as in *Hurst* v. *Beach*, would pass the interest, or induce a presumption that a legal assignment within 29 *Car.* 2. had taken place.

(7) In order to constitute a good *donatio mortis causâ*, there must be an absolute and unconditional delivery of possession to the donee, or to a third person in trust for him, which possession must continue uninterrupted to the time of the donor's death. Thus the expressing an *intention* in favour of another to a certain amount, without parting with the *possession*, will not amount to such a donation (*Bunn* v.

In the case of *Smith* and *Casen*, 8 Dec. 1718, the master of the rolls, where jewels were given by the testator, by way of *donatio causâ mortis*, doubted whether this was good against debts. And it seems not; they being given in case of the donor's death, and in nature of a legacy, which therefore would be fraudulent as against creditors. 1 *P. Will.* 106. (8)

Markham, 2 *Marsh. Rep.* 532. S. C. 7 *Taunt.* 224. *Holt*, *C. N. P.* 352. and note there); for a verbal gift of a chattel, without actual delivery, does not pass the property to the donee. *Irons* v. *Smallpiece*, 2 *B. & A. Rep.* 551. Again, per lord *Kenyon*, in *Hawkins* (*Administrator*) v. *Blewitt*, (1798,) 2 *Esp. C. N. P.* 663. donee must have immediate possession of the gift, and uncontrolled dominion over it. *Smith* v. *Smith*, 2 *Stra.* 955. *acc.* Nor does a mere removal of the securities given from one drawer of a bureau to another, under testator's direction, support a gift by him to his daughter *mortis causâ*. *Bryson* v. *Brownrigg*, 9 *Ves.* 1. However, in *Spratley* v. *Wilson*, *Knt.*, *Holt C. N. P.* 10. per *Gibbs* C. J. 1815, *semble*, that if donor say to donee, "fetch it away, and I will make you a present of it," the property passes; and see *Jones* v. *Martin*, 2 *Anstr. R.* 882. Though the proof of the transaction must be clear and satisfactory, a plurality of witnesses does not seem required, nor that the donation should be in testators *last illness*. *Walter* v. *Hodge*, 2 *Swanst.* 97. 1 *Wils. Ch. R.* 445. *Blount* v. *Burrow*, 1 *Ves. jun.* 546. 3 *Bro. C. C.* 90. 4 *Bro. C. C.* 72. *contra*. At the same time, it must be shewn to have been made in contemplation of death, and subject to revocation by donor's recovery, or by donee's death in his lifetime. *Walter* v. *Hodge*. But such donation *may* subsist, although the donor afterwards make a testament without mentioning it. *Hill* v. *Chapman*, 2 *Bro. C. C.* 612. This case turned on the testator's particular declarations with reference to the gift as annexed to an old will; and *Jones* v. *Selby*, *Pre. Ch.* 300., is the other way. Both cases shew that all the minutiæ of such transactions are to be examined — the effect depends on every word and each minute act; and see S. P. *Drury* v. *Smith*, 1 *P. Wms.* 405. &c. *Donatio mortis causâ* may be made for a particular purpose, as to carry on a suit. *Blount* v. *Burrow*, 3 *Bro. C. C.* 90. 4 *Bro. C. C.* 72. 1 *Ves. jun.* 546. S. C.

(8) *Blackstone* says, that this gift, if the donor dies, operates as a legacy (*Hedges* v. *Hedges*, *Pre. Ch.* 269.), and needs not the assent of his executor; yet it shall not prevail against creditors: and is accompanied with this implied trust, that if the donor lives, the property thereof shall revert to himself, being only given in contemplation of death, or *mortis causâ*. *Prec. Ch.* 269. 1 *P. Wms.* 406. 441. 3 *P. Wms.* 357. cited 2 *Bla. Com.* 514.; and see 1 *Add. R.* 6. This method of donation (he adds) might have subsisted in a state of nature, being always accompanied with delivery of actual possession, and so far differs from a testamentary disposition; but seems to have been handed to us from the civil lawyers, who themselves borrowed it from the Greeks, as appears from the passage from *Inst. lib.* 2. *tit.* 7. § 1. *Ff. l.* 39. *t.* 6. of a very complete donation of this kind by *Telemachus* to his friend *Piræus* in the *Odyssey*, *lib.* 17. *l.* 79. *et seq.*; another instance is by *Hercules* in the *Alcestes of Euripides*, *v.* 1020.

T. 13 G. *Thomson* [v. *Hodgson.*] An executor libelled in the spiritual court, for taking a tankard without his consent, on pretence that the testator gave it to the defendant if he died of his then sickness. And the court granted a prohibition; this not
[112] being a legacy, but a donation in prospect of death, the validity whereof may be tried in an action of trover. *Str.* 777.

For this is a matter of which the common law takes notice, and need not be proved in the ecclesiastical court. 1 *P. Will.* 441. *Sel. Cas. in Chan.* 14. (*r*)

Appointing guardians.

7. Dr. *Swinburne* says, By general custom observed within the province of York, the father by his last will or testament may for a time commit the tuition of his child and the custody of his portion; which testament and assignation is to be confirmed by the ordinary, who also is to provide for the execution of the same testament. *Swin.* 210.

And if the father die, no tutor being by him assigned, and the mother do in her last will and testament appoint a tutor; the same will is to be proved, and the assignation of the tutor confirmed. *Swin.* 210.

And if no tutor be assigned by either of the parents, then may a stranger, if he make the orphan his executor, and give him his goods, assign a tutor unto him [with respect to such goods]; which tutor is by the ordinary to be confirmed. *Swin.* 210.

And if there be no tutor testamentary at all, then may the ordinary commit the tuition of the child to his next kinsman demanding the same, according as in administrations where any dieth intestate. *Swin.* 211.

And by the said custom a tutor may be assigned to a boy at any time until he hath accomplished the age of fourteen years, and to a girl until she hath accomplished the age of twelve years. But after those years, he or she respectively may choose their own curators. But if they do not elect any other curator after their several ages, then he that is assigned in the will is to be confirmed curator to either of the said children; albeit he were above fourteen years, and she above twelve, when the will was made. *Swin.* 212. And this is according to the rules of the civil law; but by the common law, the age of choosing guardians both as to the male and female is the age of fourteen. 1 *Inst.* 78.

[113] And by the said general custom observed within the province of York, a tutor may be assigned either simply or conditionally, and until a certain time, or from a certain time. But no tutor

(*r*) If a defendant be examined to charge him with the receipt of property, his evidence is admissible to establish a gift in contemplation of death; but the court of chancery, where doubtful, has directed an issue to ascertain the fact. *Blount* v. *Burrow,* 1 *Ves. jun.* 546. 3 *Bro. C. C.* 90 4 *Bro. C. C.* 72.

may intermeddle as tutor, until he be confirmed by the ordinary, albeit he be assigned tutor simply; much less where he is assigned conditionally, or from a certain time, may he intermeddle as tutor, until the condition be extant, or the time limited be expired. But the ordinary may in the mean time commit the tuition; and he that is so appointed by the ordinary, may for that time administer. *Swin.* 215.

But, more generally, by the statute of the 12 *C.* 2. *c.* 24. (which controlleth the aforesaid custom in divers instances), Where any person shall have any child or children under the age of twenty-one years, and not married, at the time of his death; *it shall be lawful for the father* of such child or children, whether born at the time of the decease of such father, or at that time *in ventre sa mere*, or *whether such father be within the age of twenty-one years or of full age, by his deed executed in his lifetime, or by his last will* and testament in writing, *in the presence of two or more credible witnesses, in such manner, and from time to time, as he shall think fit,* to dispose of the custody and tuition of such child or children during such time as he or they shall respectively remain *under the age of twenty-one years, or any lesser time, to any person or persons, in possession or remainder, other than popish recusants:* and such person to whom the custody of such child shall be so disposed or devised, *may maintain an action of ravishment of ward* or trespass, against any person who shall wrongfully take away or detain any such child for the recovery of such child, and recover damages for the same in the same action, for the use and benefit of such child. § 8. [Guardians by statute.]

And such person to whom the custody of such child shall be so disposed, or devised, *may take into his custody to the use of such child, the profits of all lands, tenements, and hereditaments of such child, and also the custody, tuition, and management of the goods,* chattels, and personal estate of such child, till his or her age of twenty-one years, or any lesser time, according to such disposition aforesaid; *and may bring such actions in relation thereto, as by law a guardian in common socage might do.* § 9. (*s*)

Provided, that this shall not extend to alter or prejudice the custom of the city of London, nor of any other city or town corporate, or of the town of Berwick upon Tweed, concerning orphans. § 10. [114]

[Before this the 4 & 5 *Ph. & M.* enacted as to female children, That it shall not be lawful for any person or persons to take or convey away, or cause to be taken or conveyed away, any maid or woman child unmarried, being under the age of sixteen years, out of or from the possession, custody, or governance, and

(*s*) See the clauses of this statute ranged under six different heads by Mr. *Fonblanque*, in his notes to *Treat. on Eq.*, *vol.* 2. *p.* 294.

against the will of the father of such maid or woman child, or of such person or persons to whom the father of such maid or woman child by his last will and testament, or by any other act in his lifetime, hath or shall appoint, assign, bequeath, give or grant the order, keeping, education, or governance of such maid or woman child, except such taking and conveying away as shall be had, made, or done, by or for such person or persons as without fraud or covin be or then shall be the master or mistress of such maid or woman child, &c., under penalty of two years' imprisonment, or such fine as shall be assessed by the Queen's council in the star-chamber; and if he deflower or marry such child, to be imprisoned for five years, or pay such fine as shall be assessed as aforesaid.]

Of the several species of guardians, the first are guardians *by nature*, namely, the father, and (in some cases) the mother of the child. For if an estate be left to an infant, the father is by common law the guardian, and must account to his child for the profits. — There are also guardians *for nurture*; which are, of course, the father or mother, till the infant attains the age of fourteen years: and in default of father or mother, the ordinary usually assigns some discreet person to take care of the infant's personal estate, and to provide for his maintenance and education. — Next are guardians *in socage*, who are also called guardians *by the common law*. These take place only, when the minor is entitled to some estate in lands; and then, by the common law, the guardianship devolves upon his next of kin, to whom the inheritance cannot descend. These also, like guardians for nurture, continue only till the minor is fourteen years of age; for then, in both cases, he is presumed to have discretion, so far as to choose his own guardian. 1 *Black.* 461. (*t*)

Heretofore there was also a guardian *in chivalry*; which was,
[115] where the tenant by knight's service died, his heir male being under twelve years of age; in such case, the lord should have the land holden of him, until the heir should attain the age of twenty-one, and likewise the marriage of the heir, if he was unmarried at the death of his ancestor; if there was an heir female, under the age of fourteen, and unmarried, then the lord had the wardship of the land till her age of fourteen, and was to tender to her covenable marriage without disparagement. And this sort of guardianship was a kind of dominion of lords over their tenants, and was introduced among the Gothic nations, to breed them to arms; but is now fallen with the tenures: for by the 12 *C.* 2. *c.* 24. all tenures by knight service and *in capite* are taken away, and turned into free and common socage. 1 *Inst.* 74. 87, 88.

(*t*) For the various sorts of guardians, see Mr. *Hargrave's* notes to *Co. Lit.* 88. *B.*

Guardians appointed by the spiritual court, are only for the personal estate; guardians for the real estate were heretofore under the direction of the court of wards and liveries, which court being taken away by this statute, power is given by the same statute to the father by his deed or will to appoint guardians; which if he shall not do, or if the guardians appointed by him shall die or refuse to act, then the power devolveth upon the high court of chancery, the lord chancellor (under the king) being the supreme guardian of all infants and others not capable to act for themselves. (*u*)

In the case of *Buck* and *Draper*, Mar. 26, 1747, a petition was preferred to the lord chancellor *Hardwicke* by the mother of the infant, to discharge an order of the master of the rolls appointing the plaintiff guardian of her daughter, upon an allegation of his unfitness, as being disordered in his mind, and that she, the mother, had long before been appointed guardian of her daughter by the ecclesiastical court at York, and had by virtue of that appointment taken possession of the infant's person and estate.—The lord chancellor dismissed the petition with costs, the facts of the lunacy being not at all made out, and said he was surprised upon what pretence the ecclesiastical courts in the country take upon them to appoint guardians *ex officio*, without any suit instituted for that purpose, and by this means break in upon the jurisdiction of this court with respect to the guardianship of infants; and said, he recommended it to the attorney-general to consider, whether a *quo warranto* might not issue to the ecclesiastical court, upon such an extrajudicial appointment of guardians to infants, where no suit at all is depend- [116] ing for this purpose. 3 *Atk*. 631.*

It shall be lawful for the father] By the common law, before this act, it was not lawful for the father to appoint a guardian either in chivalry or socage; but the law appointed one for him: and in such case, the guardian appointed by the law could not refuse; but the guardian appointed by the father, under the statute, may refuse, if he pleaseth. *Vaugh*. 182.

For the father] Therefore the act only authorised the father, and not the mother; although she hath the same concern for

(*u*) In the case of *Whitfield* v. *Hales*, the lord chancellor made an order for a guardian and maintenance, on the ground of ill-treatment by the father. 12 *Ves*. 492.

* This is one instance, amongst many others, of the perpetual jarring between the two jurisdictions. The ecclesiastical judge probably in answer to such *quo warranto*, would return the custom within the province of York, as is here above set forth from Swinburne; which custom existed long before there was any court of chancery in this kingdom. *Burn*.

her heir as the father. And as the father only can appoint a guardian, so therefore the guardian appointed by him cannot appoint another guardian: for it is a personal trust, and not assignable, any more than guardianship in socage. *Vaugh.* 179. [*Bedell* v. *Constable.*]

In the case *Ex parte Edwards,* June 18, 1747; the mother by her will appointed a guardian to her son till his age of twenty-one. An application was now made to the court for maintenance, and in case they should not approve of the guardian appointed by the mother that a new one may be assigned. By lord *Hardwicke:* The statute confines the power of appointing a testamentary guardian to the father only; and therefore the appointment by the mother is absolutely void. And the infant being of the age of fourteen chose a guardian in court. *3 Atk.* 519.

But here being no negative words, this altereth not the custom within the province of York (as hath been expressed) for the mother by her will to appoint a guardian; that is, with respect to the personal estate; for unto that only the custom must be understood to extend; for when that custom first took place, the law itself appointed guardians for the real estate, in chivalry or in socage.

In ventre sa mere] (*x*) In like manner, by the custom within
[117] the province of York, a tutor may be assigned to a child that is not born, as also to an idiot or lunatic. *Swin.* 212.

But this statute gives no power to the father to appoint a guardian to his child being an idiot or a lunatic, after he shall be of the age of twenty-one years. (*y*)

Whether such father be within the age of twenty-one years, or of full age] Therefore the father, under the age of twenty-one, may grant the custody of his heir; but he cannot demise or devise his land in trust for him directly: but he may do it obliquely; for by appointing the custody, the land follows as an incident given by the law to attend it. *Vaugh.* 178.

By his deed executed in his lifetime or by his last will] In the case of *The Earl of Shaftesbury* and *Hannam,* where the father had given the guardianship of the infant to one by deed, and to the

(*x*) In the case *Ex parte the Earl of Ilchester,* the testator married, but not then having children, gave the guardianship of all his daughters born or to be born, to his wife, and of all his sons hereafter to be born, to his wife and his brother, or the survivor. It was held that the guardianship extended to all the children by that or a future marriage. 7 *Ves.* 348.

(*y*) The care of lunatics devolves on the crown, who generally commits it to the lord chancellor. As to the rules by which their property is managed, see *Oxendon* v. *Ld. Compton,* 2 *Ves.* jun. 69.; and 4 *Bro. C. C.* 231.

mother by will, it was decreed that the will was a revocation of the deed. *Chan. Ca. Finch.* 323. (*z*)

By his last will] And such will need not to be proved in the spiritual court. [Lady *Chester's* case,] 1 *Ventr.* 207. That is to say, if the will is merely upon this statute for the appointing a guardian and nothing else; for in such case, the appointment being solely by act of parliament, the temporal courts shall be judges thereof. But in the same will, if there is any disposition of the personalty (as is most commonly the case), it seemeth that the will shall be proved in the spiritual court for the whole: which probate shall be effectual so far as the personalty is concerned, altho' it shall be of no avail with respect to such particular appointment of a guardian by the statute. Also this consideration shall not be extended to take away any power from the spiritual court which it had before; as particularly within the province of York (as before mentioned), or within any of the places specially exempted by the statute. (9)

[*In the presence of two or more credible witnesses*] In *Riddall* v. *Liddiard*, Arches Court, 8th May, 1820, proof of attestation by two witnesses was required, in order to establish want of consent to the marriage of a minor, by some one guardian lawfully appointed. See 4 *G.* 4. *c.* 76. *tit.* Marriage.]

In such manner, and from time to time, as he shall think fit] It seemeth not to be material by what words the tutor is appointed, so that the testator's meaning do appear. Wherefore, if the testator say, I commit my children to the power of such a one, or, I leave them in his hands; it is in effect as if the testator had said, I make him tutor to my children. So it is, if he say, I [118]
leave them to his government, regimen, administration, or the like. For in all things the will and meaning of the testator is to be observed and preferred before the propriety of the words, whereof perhaps he is ignorant; which meaning is to be collected by that which went before or followeth in the will, and by other circumstances, which the judge ought to inquire. *Swin.* 216.

Under the age of twenty-one years, or any lesser time] And if the infant marries in the mean time, this shall not dissolve the guardianship. [1 *Ves.* 91. 160. Case of *E. of Shaftesbury*. *Mendez* v. *Mendez*, 3 *Atk.* 625.]

(*z*) In the case *Ex parte the Earl of Ilchester*, it was deemed that a testamentary appointment of guardian was not revoked by a subsequent testamentary appointment, not executed according to the statute, and not directly importing a revocation. 7 *Ves.* 348.

(9) No proof out of the will ought to be admitted in case of a devise of a guardianship, any more than in the case of a devise of land. *Storke* v. *Storke*, *T.* 1730. 3 *P. W.* 51. See *D. of Beaufort* v. *Bertie*, 1 *P. Wms.* 703.

Or any lesser time] If a man deviseth the custody of his heir apparent, and no time is mentioned, yet it is a good devise of the custody within the act, if the heir be under fourteen at the death of the father; because by the devise, the guardianship is changed only as to the person, and left the same as to the time. But if the heir be above fourteen, then the devise is void for the uncertainty; for the act did not intend every heir should be in custody till twenty-one, but only so long as the father shall appoint, not exceeding that time. [*Bedell* v. *Constable*,] *Vaugh.* 184.

To any person or persons (1) *in possession or remainder, other than popish recusants*] Yet there are other exceptions: As, by the 9 & 10 *W. c.* 32. Persons [denying the Trinity (2),] or asserting that there are more Gods than one, or denying the Christian religion to be true, or the Holy Scriptures to be of divine authority, shall for the second offence be disabled to be guardians.

And by the statutes relating to the qualification for offices, persons executing their respective offices, without taking the oaths and performing the other requisites for their qualification, shall be disabled to be guardians.

Also, in general, he that cannot be an executor, cannot be a guardian. *Swin.* 211.

May maintain an action of ravishment of ward] The ecclesiastical court cannot intermeddle with the *body*, although the parents make no disposition thereof. [*Baynes* v. *Lowder*,] 3 *Keb.* 834.

But by the express words of this act, the guardian by will takes place of all other guardians; and the guardian under this statute may have ravishment of ward, as the guardian by knight's service or in socage at common law might have had. [*Knoyle* v. *Heymor*,] 3 *Keb.* 528. 2 *P. Will.* 115.

May take into his custody, to the use of such child] This guardian being made after the model of a socage guardian, and coming in the place of the father, hath not a bare authority, but
[119] an interest; but it is only an interest joined with his trust (as being necessary in order to the performance of the trust), but not an interest for himself. *Vaugh.* 181. 183. 2 *P. Will.* 122.

The profits of all lands] A guardian by nurture, being so appointed by the testator's will, can only lease at will, and not for any number of years; for the guardian himself (except he be

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(1) A guardianship devised to three persons shall survive, without words of survivorship. *Eyre* v. *Shaftesbury*, 2 *P. W.* 104. *Gilb. Eq. R.* 172.

(2) This act is repealed as far as relates to denying the Trinity, by 53 *G.* 3. *c.* 160. § 1.

guardian in socage) is only tenant at will. *Cro. Eliz.* 678. 734. (3) 8 *Mod.* 312. (4)

In the case of *Roe*, on the demise of *Perry*, against *Hodgson*, *T.* 33 *G.* 2. Upon a case stated for the opinion of the court of common pleas, the principal question was, whether a lease for twenty-one years, made by the testamentary guardians of an infant, Mr. Spencer, was absolutely void or only voidable. It appeared, that Mr. Spencer himself has done no one act since he came of age, either towards establishing the lease (supposing it voidable) or to avoid it. Upon the first argument, the court agreed in one point, viz. that a testamentary guardian by statute till an infant was twenty-one years of age, and a guardian in socage till an infant was fourteen, were the same; and therefore whatever interest the latter had in lands till the infant was fourteen, the guardian by statute has the same until he is twenty-one. As to the main question, whether the lease was void or only voidable, they doubted much, and took further time to consider. And at last they resolved unanimously, that a guardian of an infant cannot make a lease of the infant's lands, and that the lease in this case was absolutely void. 2 *Wilson*, 129. 135.

Of all lands, tenements, and hereditaments, of such child] It seemeth that this guardian shall have the custody, not only of lands descended, or left by the father, but of all lands and goods any way acquired or purchased by the infant (which the guardian in socage had not); which proves that he derives not his interest from the father, but from the law; for the father could never give him power or interest of or in that which was never his. 2 *P. Will.* 185.

And also the custody, tuition, and management of the goods] *Swinburne* says, the office of a tutor is, to provide that his pupil be honestly and virtuously brought up; and to provide for him meat, drink, clothes, lodging, and other necessaries, according to the child's estate, condition, and ability. *Swin.* 217.

And the same also doth farther consist, in the good and faithful administering or disposing of the goods and chattels of the said pupil; that is to say, the tutor may not commit any [120] thing that may be hurtful, nor omit any thing that may be profitable to his pupil, and in the end must restore unto his pupil all his goods and chattels, by him the said tutor before received. And for that purpose every tutor ought, even at the very entry into his office, to make a true inventory of all the goods and chattels of his pupil, and to make a just and true account of his dealings in behalf of his pupil. And it is generally observed within the said province of York, that every

(3) *Pigott* v. *Garnish.*

(4) *Skipworth* v. *Green*; and see *Co. Lit.* 57.

tutor, as well testamentary as other appointed by the ordinary, doth enter into bond with sureties to the effect aforesaid, according to the discretion of the ordinary. *Swin.* 217.

The tutor may sell such goods belonging to the pupil, as cannot be kept until he come to lawful age. But other goods which may conveniently be kept, and especially goods immoveable, the tutor may not sell; unless otherwise ordered by will. *Swin.* 217.

More particularly; the guardian ought to apply the estate in his hands, to pay the *debts* of the infant. 1 *Cha. Ca.* 157.

He may pay off the *interest* of any real incumbrance, and the *principal* of a *mortgage*; because it is an immediate charge on the land: but no other real incumbrance. *Prec. Cha.* 137.

In the case of *Waters* and *Ebral*, *H.* 1707, where the mother, as guardian, received the rents of the estate, and paid off specialties, but took assignment, and after the death of the infant brought a bill against the heir for a discovery of assets by descent (she claiming the rents received as administratrix); it was held by the court, that the guardian is not compellable to apply the profits of the estate of the infant, to pay off the *bond* debts of the ancestor. 2 *Vern.* 606.

In the case of *The Earl of Winchelsea* and *Norcliffe*, *T.* 1686. A guardian, having a considerable sum of money in his hands, laid it out in a *purchase* of lands, for the benefit of the infant, if when he came of age he should agree to it; the infant dying in his minority, it was decreed that the guardian should account for the money to the administrator of the infant; for that he could not, without the direction of the court, convert the personal into real estate. 1 *Vern.* 403. 435.

M. 35 *C.* 2. *Osborn* and *Chapman*. A guardian at the request of one who was going to marry the ward, gave in an account of the estate to the intended husband, and secured to him the
[121] balance by three several bonds; and the intended husband gave a bond to the guardian, to release all accounts to him after the marriage: The marriage was had: The guardian paid the balance: But the husband gave no release, but sued for an account and relief against the bond. And the guardian was ordered to answer the bill: For the account was made when the intended husband had no title; no release was given; and the pursuit is fresh. 2 *Cha. Ca.* 157.

For, by *Cowper* lord chancellor: Wherever a father, mother, or guardian insists upon private gain, or security for it, and obtains it of the intended husband, it shall be set aside. 1 *Salk.* 158. 2 *Vern.* 652.

For *marriage brocage agreements* have been often condemned in equity. And a bond to give money, if such a marriage could be obtained, is ill. And so is a bond to forgive a sum of money.

For such bonds, although good at law, yet being introductive of infinite mischief, have upon great consideration been condemned in equity. *3 P. Will.* 394. [*Ib.* 76. And see *Herrington* v. *Du Chatel*, 1 *Bro.* 124. (*a*)]

But a guardian, upon account, shall have allowance of all reasonable costs and expences in all things. *Litt.* § 123.

And if he receive the rents and profits, and be robbed without his default or negligence, he shall be discharged thereof. 1 *Inst.* 89.

By the statute of the 4 *An. c.* 16. actions of account may be brought against the executors or administrators of guardians.

By the 6 *An. c.* 18. § 5. Any person who as guardian or trustee for any infant shall hold over after the determination of the particular estate, without consent of the person next entitled, shall be adjudged a trespasser, and shall pay damages to the value of the profits received.

By the 7 *An. c.* 19. § 1. Infants seised or possessed of lands in trust, or by way of mortgage, shall and may, on direction of a court of equity, signified by an order made on hearing all parties, on petition of the person for whom such infant shall [122]
be seised in trust, or the mortgagor, or guardian of such infant, convey and assure the said lands, as such court shall direct.

[By 4 *G.* 3. *c.* 16. § 1. The same provision applies where such lands, &c. are situate within the duchy of Lancaster, or in either of the counties palatine, or in Wales; under direction of the court of duchy chamber of Lancaster, or of exchequer of Chester, of the courts of chancery, of Lancaster, and Durham, and of great sessions in Wales. By 7 *A. c.* 19. § 2. and 4 *G.* 3. *c.* 16. § 2. such infants being only trustees or mortgagors may be compelled by such order to make such conveyances in like manner as trustees or mortgagees of full age.]

By the 29 *G.* 2. *c.* 31. Guardians on application to a court of equity, may obtain an order for infants to surrender leases, in order to accept new ones.

[And by the 4 *G.* 4. *c.* 76. (*tit.* Marriage.) Guardians may consent to the marriage of such infants.]

And may bring such actions in relation thereto, as by law a guardian in common socage might do] And he may also submit matters to arbitration; for though the infant cannot submit to an award, yet the guardian may do it for him, and bind himself that the infant shall perform it. *Comb.* 318.

An infant may sue either by his guardian or next friend;

(*a*) If the consideration of such a bond is void as contrary to general policy, upon the principles laid down by the court of C. B. in *Collins* v. *Blantern*, 2 *Wils.* 347., it might be pleaded at law.

but must defend by his guardian. [*Simpson* v. *Jackson*,] *Cro. Ja.* 641.

And if an infant refuseth to name a guardian to appear by; the plaintiff, by order of the court, may do it for him. [*Stone* v. *Atwoll. Shipman* v. *Stephens*, 2 *Wils.* 50. S. P.] *Str.* 1076.

And the *prochein amy*, or next friend, need not to be a relation; but he must be a person of substance, because liable to costs. 1 *Atk.* 570.

And when an infant brings an action by his guardian, the warrant for him to appear by guardian ought to be entered upon record, because it is the act of the court; for the court takes care of infants, that none shall sue for them, but those that are responsible; for if the infant be prejudiced, he may have this action against him. [*Pechey* v. *Harrison*,] *Ld. Raym.* 232.

But the suit is not in the name of the guardian, but of the infant; for at this day a guardian doth not act in any cause for a minor in his own name, as guardian; but the minor acts in his own name by his guardian. 1 *Ought.* 337. 359.

Guardians to natural children. Though, strictly speaking, testamentary guardians cannot be appointed to natural children, yet on the petition of the infant, and the consent of the guardians named by the putative father, the court of chancery will appoint them, without reference to the master. *Ward* v. *St. Paul*, 2 *Bro. C. C.* 583. [*Peckham* v. *Peckham*, 2 *Cox.* 46. 2 *Bro. C. C.* 584, S. P.] And in *The King* v. *Cornforth*, 2 *Stra.* 1162., the court of king's bench granted an information against the defendant for taking away a natural daughter under sixteen, from under the care of her putative father, being of opinion this was within 4 & 5 *P. & M. c.* 8. § 3.

Appointing of executors. 8. By the 9 & 10 *W. c.* 32. Persons [denying the Trinity (5)] or asserting that there are more Gods than one, or denying the
[123] Christian religion to be true, or the Holy Scriptures to be of divine authority, shall for the second offence be disabled to be executors.

By the 5 *G.* 1. *c.* 27. § 3. Artificers going out of the kingdom, and exercising their trades in foreign parts, shall be incapable of the office of executor.

And by the acts for the qualification for offices, persons not having taken the oaths and performed the other requisites for qualifying, who shall execute their respective offices after the time limited for their qualification shall be expired, shall be disabled to be executors.

An *infant* may be made executor, how young soever he be. *Swin.* 331.

And if the infant executor be so young, that he hath no discretion (for it is not only lawful to make such an one executor,

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(5) Repealed as far as relates to denying the Trinity by 53 *G.* 3. *c.* 160. § 1.

but also the child in the mother's womb and unborn at the death of the testator); in that case the ordinary, or other to whom the approbation of the testament appertaineth, after the birth of the child, doth commit the execution of the will to the tutor of the child for the child's behoof, until he be able to execute the same himself; which tutor hath authority to deal as executor until the child be able to undertake the executorship, that is to say, until he be of the age of seventeen years. (6) During which minority, the administrator to the child's use cannot sell or alienate any of the goods of the deceased, unless it be upon necessity; as for the payment of the deceased's debts, or that the goods would otherwise perish; nor let a lease for a longer term than whilst the executor shall be in minority, because having that office for the good and benefit of the child only, he may not do any thing to his prejudice. *Swin.* 359, 360. (6)

And after his age of seventeen years, before he shall come to the age of twenty-one, an act done by such infant as executor, as (for instance) the releasing of a debt due to the testator, or the selling or distributing of the testator's goods, is said to be sufficient in law (6): Which is to be understood, upon true payment and satisfaction of the debt due to the deceased, made to the executor in minority; for then he may acquit and discharge the debtor for so much as he doth receive; for therein he doth perform the office and duty of an executor, which he is enabled to do; and so doing, his act shall bind him. But if he shall release without satisfaction, this act is not according to the office and duty of an executor; and therefore being without the compass of his office and duty, shall not bind or bar him from recovery thereof: for if it should, then should it be a *devastavit*, [124] and charge the minor out of his own proper goods; which cannot be by law: for an infant may better his estate, but not make it worse, by contracting with or acquitting of another person. *Swin.* 358, 359. 2 *Bac. Abr.* 377.

M. 1730. *Jones* and *The Earl of Strafford.* In the case where an administration is granted during the minority of an infant executrix being under the age of seventeen years, and she marries a husband of age, *King* lord chancellor and *Raymond* chief justice strongly inclined against the opinion reported by lord *Coke* in *Prince's* case, that such administration during the mi-

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(6) But by 38 *G.* 3. *c.* 87. § 6, 7. (extended to Ireland by 58 *G.* 3. *c.* 81. § 1, 2.) where an infant is sole executor, administration with the will annexed shall be granted to his guardian, or to such other person as the spiritual court shall think fit, until such infant has attained the full age of twenty-one years; at which period, and not before, probate shall be granted to him. And the person to whom administration shall be granted shall have the same powers vested in him as an administrator, *durante minore ætate*, of the next of kin; and see *infra*, IV. 214.

nority of the executrix is determined: the same being extrajudicial in that case, and not taken notice of by other cotemporary reporters; and the author of the book intitled *The Office of Executors*, mentioning this opinion, a little marvels thereat, considering (as he observes) that these things are managed in the spiritual court, and by the canon law, which intermeddles not with the husband in the wife's case; and that by that law, and not by the common law, comes in this limitation of seventeen years; and he adds, that he hath seen that case otherwise reported in this point. 3 *P. Will.* 88.

Swinburne says, If a *wife* during the coverture be named executrix, she alone cannot sue for any debt due to the testator, without her husband. But (he says) she alone may do an act extrajudicial, as the paying of debts or legacies, or the receiving or releasing of any debts due to the testator. *Swin.* 417.

And the husband and wife being but one person in law, she cannot be executrix without his assent; for if she might, then he would be executor against his will: therefore, if she is made executrix, she cannot bring an action alone, but her husband must join with her; and if he should refuse, he cannot be compelled, nor can she be compelled to plead without her husband. *Swin.* 417, 418.

But (he says) although she cannot sue or be sued without him, yet she may deliver any of the testator's goods to another to keep; and may pay legacies, and receive debts, and give acquittances without her husband; and if any *devastavit* is made by giving acquittances, it shall bind them both, because she could not administer without his assent; and it shall be accounted his folly to suffer such a person to administer. *Swin.* 418.

[125] But it seemeth that this must be understood only according to the spiritual law, which in this case maketh no difference betwixt married and sole: for otherwise it is by the common law.

For by the common law, the assent to a legacy by a feme covert executrix is not good, unless her husband assent to it also: otherwise it is void: but the assent to such legacy by her husband is good. *Law of Ex.* 264. 2 *Bac. Abr.* 378.

And the release of a feme covert executrix is not good; for she can do nothing to the prejudice of her husband: but without question the release of the husband is good. *Curson*, 53. 1 *Roll's Abr.* 924.

And this not only during the marriage, but also after the death of the husband. But if the wife die, the husband cannot convert any of the goods and chattels belonging to the first testator to his own proper use; for of such goods the wife herself may make a testament (*Swinburne* says) appointing an executor, without the licence of her husband. *Swin.* 417. (*b*)

(*b*) *Vide supra*, I. 7.

And if the husband commits waste, and then she dies; there is no remedy at common law against her husband, but only in the spiritual court, where he will be compelled to make restitution. 1 *Roll's Abr.* 919.

In the case of *Taylor* and *Allen*, Oct. 29, 1741. The testator made the defendant Allen, who was a feme covert, his executrix, the husband being then in England, but at the death of the testator the defendant's husband was in the West Indies. It was moved for an injunction to restrain the defendant from getting in the assets of her testator, and for a receiver to be appointed. By lord *Hardwicke*: There are several instances where this court hath interposed to prevent an executor from getting assets of a testator into his hands upon particular circumstances; and this is one of those cases, for the husband being in the West Indies, and not amenable to the process of this court, the plaintiff can have no remedy, if the executrix should waste the assets, or refuse to pay, because the husband must be joined in the action. And a receiver was appointed, to collect in the assets, and to bring actions in the name of the executrix for recovery of debts due to the testator; on giving security to indemnify the executrix and her husband on account of such actions brought. 2 *Atk.* 213. [126]

9. Although an executor becomes a *bankrupt*, yet administration cannot be committed to another; but if an executor become *non compos*, the spiritual court may commit administration. 2 *Bac. Abr.* 376. (7) **[Executor, bankrupt, or *non compos.*]**

And in the court of chancery, forasmuch as an executor is considered only as a trustee; if he be insolvent, that court will oblige him, as they will any other trustee, to give security before he enters upon the trust. 2 *Bac. Abr.* 377. (*c*)

(7) *Hill* v. *Mills*, 1 *Salk. R.* 36. The appointment by formal instrument, of a party to be an executor, which is in law a beneficial office, can only be revoked expressly or by necessary implication. Where, therefore, by a first appointment, *A.*, *B.*, and *C.*, were made executors, and by two codicils *B.* and *C.*'s appointments were revoked, and *D.* and *E.* were named in their places, this does not revoke the appointment of *A.*, who was not noticed in the subsequent alterations, and *A.*, *D.*, and *E.*, are the executors. *Sherard* v. *Sherard*, 2 *Phil. R.* 251. An executor for whom an appearance had been given may be dismissed; for it is not unusual for the court to dismiss an executor, who has not intermeddled with the effects, or gone to such a length in a cause as to render himself liable to costs. *Panchard* v. *Wegcr*, 1 *Phill. Rep.* 212.

(*c*) If it appear that an executor is insolvent, or the fund in danger the court will appoint a receiver, or order as much as he admits to have in hand to be paid into the bank. *Ex parte Ellis*, 1 *Atk.* 101. *Strange* v. *Harris*, 3 *Bro. C. C.* 365. [See also *Duncumbar* v. *Stint*,

And by a constitution of archbishop *Stratford*, the executor, at the time of proving the will, shall give security (if need be) to render a just account of his administration, when duly thereunto required by the ordinary. *Lind.* 177.

As to the *form and manner* of making an executor in the will, it is not always necessary to express this word *executor*, neither hath every testator skill so to do; but it is sufficient, if the testator's meaning do appear by other words of like sense or import: as, if the testator say, I commit all my goods to the disposition of *A. B.*; or, I leave all my goods, or the residue of all my goods, to *A. B.*, or the like; for in these cases, he to whom all the residue is bequeathed is thereby understood to be made executor. *Swin.* 247. (8)

Supervisors.

10. Overseers of a will have no power to intermeddle, otherwise than by counsel and advice, or by complaining in the spiritual court. *Went.* 9, 10.

Sir *Thomas Ridley* takes occasion to wish, that they might be made of more use; although at present (he says) they be looked upon only as candle-holders; having no power to do any thing but hold the candle, while the executors tell the deceased's money. *Ridley, Part* 4. *Ch.* 2.

Attesting the execution of the will. (*d*)

[127]

11. If the testator shew the will unto the witnesses, saying, This is my last will and testament; or, Herein is contained my last will; this is sufficient without making the witnesses privy to the contents thereof; provided the witnesses be able to prove the identity of the writing, that is to say, that the writing now shewed is the very same writing which the testator in his lifetime affirmed before them to be his will, or to contain his last will and testament. *Swin.* 52. *God. O. L.* 66.

Whether it is necessary, that the testator should declare to the witnesses, at the time of the attestation, that the writing which they attest is his will, hath been matter of some doubt. As in the case of *Wallis* and *Wallis*, *T.* 1762. Thomas Wallis, esquire, made his will, and therein devised his real estate to his wife for life; the will was of his own handwriting; and the form of attestation was in these words, *signed, sealed, published, and declared for the last will and testament of the said Thomas Wallis, in the presence of us, &c. Isabella Matthews, James Wardell, William Powell.* The heir at law brought an ejectment. The

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1 *Ch. C.* 121. *The King* v. *Raines*, 1 *Salk.* 299. 1 *Ventr.* 335.] Whether the spiritual court can exact security, *vide infra, Probate*, 19.

(8) An executor may be appointed in conjunction with others; but in the latter case they are all considered by the law in the light of an individual person. 3 *Bac. Abr.* 30. *Off. Ex.* 95.

(*d*) See farther on this head, *supra*, I.

widow pleaded the devise to her for life. The cause came on to be heard at the summer assizes at Lincoln, 1762, by a special jury, before Mr. Justice Denison. To prove the execution of the will, the defendant produced William Powell, the testator's coachman, one of the three subscribing witnesses, who deposed, that in the beginning of July 1760, James Wardell, then butler to the said Thomas Wallis, came and told him the said Powell, that he was to come to his master; that upon entering the room, he found his master sitting with a table before him, on which were some papers open; and that his master called him, and the said Wardell, and one Isabella Matthews, then his housekeeper, up to the table to him; where they all came. Then the said Thomas Wallis, further addressing himself to them all, desired them to take notice; and then took a pen, and in all their presence signed and sealed each part of his will, and laid both the said parts open and unfolded before them to subscribe their names as witnesses thereto; which they all did, by the direction of the said Thomas Wallis in his presence, and in the presence of each other; he shewing them severally where to write their names. But that the said Thomas Wallis, otherwise than as above, did not declare or publish either part to be his will, or say what it was. The counsel for the plaintiff contended that this was not a sufficient proof by one witness, of a complete execution of the will. And they produced on the other hand, the other two subscribing witnesses; who in divers particulars did not give a clear and distinct evidence; and could not recol- [128]
lect whether they had signed one or two papers; or whether then, or at any time before the said Thomas Wallis's death, they understood what they had so witnessed to be the said Thomas Wallis's will, though Wardell seemed to admit he conjectured it to be so. But both Wardell and Matthews swore that they did not see the said Thomas Wallis sign or seal either part of his said will; that Powell, the other subscribing witness, was not at that time in the room, when (at the said Thomas Wallis's desire) they wrote their names to the two papers as they now appear; that the said Thomas Wallis did not declare or publish it as his will, nor did they know it to be a will. The defendant's counsel then called Richard Price, the said Thomas Wallis's groom, who swore, that one morning in the beginning of July 1760, James Wardell told him that his master had much wanted him; and that upon his the said Price's offering to go to his master to receive his orders, the said Wardell told Price that the business was done, and that Powell had supplied his place; and that he the said William Powell, James Wardell, and Isabella Matthews had that morning been witnessing their master's will. And Sarah Dixon being called, swore, that in the beginning of July 1760, Isabella Matthews came one morning after breakfast

into the kitchen, and told her that she the said Matthews, James Wardell, and William Powell, had that morning witnessed their master's the said Thomas Wallis's will, though he had not told them it was so. Upon this state of the evidence on both sides, it was insisted for the plaintiff, that as the law stood before the statute of frauds, *publication* of a will was an essential part thereof; and if so, there is nothing in that statute to take it away: And further it was insisted, that by the said statute there are four requisites to constitute a good and valid devise of lands: 1. That it shall be in writing. 2. That it shall be signed by the party devising, or by some other person in his presence, and by his express directions. 3. That it shall be attested and subscribed in the presence of the devisor by three or four credible witnesses. 4. That the words *attested and subscribed* must import that it shall be published as a devise or will by the testator in the presence of the said witnesses. On the contrary, for the defendant it was insisted, that neither before nor since the statute publication was necessary; and that by the statute, only the three first requisites are necessary, which in the present
[129] case were all complied with, the devise being in writing, and signed by the testator in the presence of three credible witnesses, who had subscribed their names as witnesses to the same in the presence of the testator and of each other; and further, supposing any such publication was necessary, that the testator had used words and done acts which amounted to a publication within the meaning of the statute, which had not directed or prescribed any particular form or manner in which such publication should be made; that the testator using these significant words to all the witnesses when he called them up to the table, "*take notice*," and then signing both parts of his will, and then delivering both the parts thereof to the witnesses to attest, directing them where to sign their names, and to witness each part under the common and usual form of attestation, which the witnesses did, was a sufficient execution and publication of his will; that the words "*signed, sealed, published, and declared*," being all written in the testator's own handwriting, and the witness Powell swearing that both the parts of the will lay open to the inspection of all the witnesses when they subscribed their names, and it appearing by the evidence of Price and Dixon that both the other witnesses had declared that they had been attesting the said Thomas Wallis's will, this was much stronger than the case of *Peate* and *Ougley*, reported in *Comyns*, 197. And Mr. Justice *Denison* was of opinion, if the witnesses for the defendant were credited by the jury, that this was a due execution within the statute, and a sufficient publication; and for this cited the case of *Trimmer* and *Jackson* lately determined in the court of king's bench. And the jury found accordingly a ver-

dict for Mrs. Wallis the defendant. Nevertheless, the plaintiff's counsel insisted, that the point, whether a good publication or not, should be reserved for a case to be argued above. — But the matter was compromised, on the defendant's remitting the costs.

Note: The case of *Peate* and *Ougley* was, where the testator produced to the witnesses a paper folded up; and desired them to set their hands to it as witnesses, which they all did in his presence, but they did not see any of the writing, nor did he tell them it was his will, or say what it was; but it was all written by the testator's own hand. It was objected, that this was not a good execution of the will within the statute: for it is not sufficient that the witnesses write their names in the presence of the testator, without any thing more; but they must attest every thing, to wit, the signing of the testator, or at least the publication of his will: But here the testator neither signed the [130] will in their presence, nor declared it to be his last will before them. On the other part, it was insisted, that the execution was sufficient within the statute; for there is no necessity that the witnesses see the testator write his name; and if he writes these words, *signed, sealed, and published* as his will, and prays the witnesses to subscribe their names to that, it will be a sufficient publication of his will, though the witnesses do not hear him declare it to be his will. And *Trevor* chief justice inclined, that here was sufficient evidence of the execution, and the jury found it accordingly. But as to the matter of law, he permitted it to be found special. And it doth not appear further what became of it.

The case of *Trimmer* and *Jackson* was, where the witnesses were deceived by the testator at the time of the execution, and were led to believe from the words used by the testator at the execution of the instrument that it was a deed and not a will. It was delivered as his act and deed; and the words "*scaled and delivered*" were put above the place where the witnesses were to subscribe their names. And it was adjudged by the court, as it is said, for the inconveniences that might arise in families, from having it known that a person had made his will, that this was a sufficient execution. (*e*)

Wills to be construed favourably

12. The intention of the testator is called by lord *Coke* the pole star, to guide the judges in the exposition of wills.

In *Rivers*'s case, *M.* 1737. The testator by his will gave certain lands to his two sons, James and Charles Rivers. It appeared that they were illegitimate children; and the question was, whether this is such a description of their persons as will

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(*e*) See also lord *Hardwicke*'s opinion in *Rigden* v. *Valier*, 2 *Ves.* 252.; *et infra*, 18.

intitle them to take under the will. By lord *Hardwicke*: In the case of a devise, any thing that amounts to a *designatio personæ* is sufficient; and though in strictness they are not his sons, yet if they have acquired that name by reputation, in common expression they are to be considered as such: It hath been objected also, that the testator hath made a mistake in their *names*, and that therefore they cannot take; but the law is otherwise; for if a man is mistaken in a devise, yet if a person is clearly made out by averment to be the person meant, and there can be no
[131] other to whom it may be applied, the devise to him is good. 1 *Atkyns*, 410. (*g*)

But although by the law the intention is more to be considered than the words; yet such intention must be collected out of the words, and it must consist with the law. *Swin.* 10. (*h*)

[" Bastards," when shall take and not take as " children."]

(*g*) Under a devise to " children, *generally*," it was held that an illegitimate child was not entitled to share, notwithstanding a strong implication upon the will in favour of the child. *Cartwright* v. *Vawdry*, 5 *Ves.* 530. *Godfrey* v. *Davis*, 6 *Ves.* 43. [But it is otherwise if proved by the *will itself* to be so intended; but extrinsic evidence can only be received for the purpose of collecting who had acquired the repution of children. *Swaine* v. *Kinnerley*, 1 *V.* & *B.* 469. Bastards cannot take as children of any particular person, till they gain names by reputation. That reputation begins with their births. Therefore, a bequest to *all* the natural children of *J. S.* extends not to bastards born after the making the will, nor to a child *en ventre sa mere*. *Meetham* v. *Duke of Devon*, 1 *P. Wms.* 529, 530. *Arnold* v. *Preston*, 18 *Ves. R.* 288. *Earle* v. *Wilson*, 17 *Ves.* 531. *Wilkinson* v. *Adam*, 1 *Ves.* & *B.* 422. 452. 466. And this rule applies, though the bequest was to be paid as testator should by deed appoint; for his appointment referring to the will was held to be a codicil only. *Meetham* v. *Duke of Devon*. But a bastard may take by purchase, if sufficiently described, and if he has acquired the reputation of being the child of that person. *Wilkinson* v. *Adam*. A legacy to " the children of the late *C.* who shall be living at the testator's death," extends to illegitimate children then living, where *C.* had no legitimate children. And it was also held, that where there were not nor ever can be any persons strictly answering the description of " *children*," it is necessary to resort to evidence *dehors* the will, to discover whether there were any who had acquired the reputation of children; for it is possible that *illegitimate* children may acquire that reputation. *Woodhouselee* v. *Dalrymple*, *E.* 1817, 2 *Meriv. R.* 419.; see *notes*, p. 148. and 166.

(*h*) A will cannot be varied upon the ground of mistake, unless the alleged mistake be clearly inconsistent with the intention upon the *whole* will. *Mellish* v. *Mellish*, 4 *Ves.* 45. Where such mistake does appear, the court will correct it. *Phillips* v. *Chamberlain*, 4 *Ves.* 51. If two parts of a will be totally irreconcilable, the latter overrules the former. *Sims* v. *Doughty*, 5 *Ves.* 243. [But Mr. *Bridgman* observes, that this rule, though adopted from necessity, is not satis-

Thus, in the lord *Cheiney's* case, *M.* 33 & 34 *El.* sir Thomas Cheiney, knight, lord warden of the cinque ports, made his will in writing, and thereby devised to Henry his son divers manors, and to the heirs of his body, the remainder to Thomas Cheiney of Woodley and to the heirs male of his body, upon condition *that he or they, or any of them, shall not aliene or discontinue.* And the question was in the court of wards, between sir Thomas Perot, heir general to the lord warden, and divers purchasers of sir Thomas Cheyney, whether the said sir Thomas Perot shall be received to prove by witnesses, that it was the intent and meaning of the devisor to include his son and heir within these words of the condition [*he or they*], and not only to restrain to Thomas Cheiney of Woodley and his heirs male of his body. But *Wray* and *Anderson* chief justices, upon conference had with the other justices, resolved that he shall not be received to such averment out of the will; for a will concerning lands ought to be in writing, and not by any averment out of it; for it will be full of great inconvenience, if none shall know by the written words of a will what construction to make, or what advice to give, but the same shall be controuled by collateral averments out of the will. But if a man hath two sons, both baptized by the name of John, and thinking that the elder (who hath been long absent) is dead, deviseth his land by will in writing to his son John generally, and in truth the elder is living; in this case the younger John may in pleading or in evidence allege the devise to him; and if this be denied, he may produce witnesses to prove the intent of his father, that he thought the other to be dead, or that at the time of making the will he named his son John the younger, and the writer omitted the addition of the younger: and in this case no inconvenience can arise; for he who shall see the will by which the land is devised to his son John, cannot be deceived by any secret invisible averment, for when he shall see the devise to his son John, he ought at his peril to inquire what John the testator intended, which may easily be known by him who writ the will, and others who were privy to the intention; and if no direct proof can be made of the intention, then the devise is void [132]
for the uncertainty. 5 *Co.* 68.

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factory, especially on account of the retrospective effect on the execution of the whole and each part of the will at once.] In a late case lord *Ellenborough* laid down this rule; that the court could not go into one part of a will to determine the meaning of another, *perfect in itself*, and *without ambiguity*, and not militating with any other provision respecting the same subject-matter, notwithstanding that a more probable disposition for the testator to have made might be collected from such assisted construction. *Right and Compton* v. *Compton*, 9 *East's Rep.* 267.

But this rule hath received a distinction of late, which hath greatly prevailed, between evidence offered to a court, and evidence offered to a jury. For in the last case, no parol evidence is to be admitted, lest the jury should be inveigled by it; but in the first case it can do no hurt, being to inform the conscience of the court, who cannot be biassed or prejudiced by it. And accordingly, in divers instances, collateral evidence hath been admitted in the court of chancery, to explain the testator's intention. *Law of Test.* 306. 2 *Bac. Abr.* 309.

And in the case of *Selwin* and *Brown*, *M.* 1734, lord Talbot admitted, that it had sometimes been allowed. *Cas. Talb.* 240. (*i*)

But notwithstanding these cases, the courts have been very unwilling to admit of parol evidence in relation to any thing that appears on the face of a will; and it is certain that too much caution cannot well be used in this particular, especially when it
[133] is considered that the statute of frauds and perjuries, which was made to prevent perjury, contrariety of evidence, and uncertainty, binds the courts of equity as well as the common law courts; as also that little regard ought in many cases to be had to the expressions of the testator, either before or after the making his will, because possibly these expressions might be used by him on purpose to conceal or disguise what he was doing, or to keep the family quiet, or for other secret motives and inducements which cannot after his death be found out. 2 *Bac. Abr.* 310.

And in the case of *Lowfield* and *Stoneham*, *M.* 20 *G.* 2. 1747,

(*i*) In *Fonnereau* v. *Poyntz*, 1 *Bro. C. C.* 472., the testatrix gave several legacies of *stock in long annuities*, *viz.* 500*l.*, 500*l.*, 200*l.*, and 100*l.*, and the residue to her nephews; and it being uncertain from the other directions of the will, whether the above-mentioned sums were meant as annuities to those amounts, or as gross sums of money to be laid out in the long annuities, lord *Thurlow* C. at first decreed, that the sums were annuities, and that the legatees must abate proportionably; but on a rehearing, his lordship admitted collateral evidence of the value of the testatrix's estate, which was only 120*l. per annum* long annuities, and decreed that the legacies were gross sums; because it could not be supposed that the testatrix meant to give away in legacies ten times more than she was worth. Such evidence was also admitted by lord *Hardwicke* in *King* v. *Philips*, 1 *Ves.* 232. In which cause the question being, whether the plaintiff could take as a creditor under articles, and also as a legatee under a will? his lordship said, "This legacy being so near in value to the personal estate that it will defeat the rest, I will do what lord *Jefferies* and lord *Cowper* have done in such a case, direct an account to be taken of the value of the personal estate at the testator's death, and at the making of the will; which fact may give some light as to the intent, and is a fact necessary to be known before I determine it." So parol evidence may be received to shew that the name of one legatee has been inserted for that of another. 8 *Vin. Ab.* 312. 29. 2 *Ves.* 216. 6 *T. Rep.* 671.

[cited *Cambridge* v. *Rous*, *M.* 1802, 8 *Ves. R.* 22.] upon *pleue administravit* pleaded, the question was, whether 1000*l.* received by the defendant was due to her in her own right, or as executrix of her husband, and consequently assets. And it arose upon the following devise: "I give to my loving brother John Stone-"ham 1000*l.*, and in case of his death, to his wife Susanna" (who was the defendant). It appeared that John Stoneham survived the testator. And therefore the plaintiff insisted this legacy (which the defendant admitted that she had received) vested absolutely in him, and was assets in her hands. On the part of the defendant, it was offered to give in evidence, that the testator *in extremis* declared, he meant only to give his brother the interest of the 1000*l.*, and that the defendant should have the principal in case she survived him. The parol evidence was opposed by the plaintiff's counsel, as being contradictory to the plain words of the will. And *Lee* chief justice said it could not be allowed; and that in the case of *Selwin* and *Brown* (aforesaid), the house of lords had refused it (*k*), even where it was to support the legal interpretation of the will; and lord Hardwicke, about two years ago, held it in the same manner in the case of the *Earl of Inchiquin* and *Obrian*, *Str.* 1261.

And in the case of *Ulrich* and *Litchfield*, July 23. 1742.; the testatrix bequeathed her real and personal estate to Elizabeth Travers and James Ulrich, equally between them for life; and upon the death of Elizabeth Travers, she gave the whole estate to James Ulrich in tail general, and for want of such issue to Richard Ulrich in fee; with a few pecuniary legacies; and charged her real estate with payment of these legacies, if her personal estate should not be sufficient; and by her will declared she gave all the *rest and residue of her personal estate* to her uncle Leonard Collard's three daughters; and particularly gave to Mrs. Susanna Litchfield 10*l.* and made her executrix.—— [134]
For the residuary legatees, it was insisted, that *rest and residue* of her personal estate must mean the residue after the particular legacies are paid off; and could not refer to the beginning of the will, because there is a fee devised, and consequently the testatrix has disposed of the whole: That parol evidence in this case may be admitted of the attorney who drew the will, that he had express directions to give the personal estate to the three daughters of Leonard Collard: That (to be sure) things which are quite contrary to the will shall not be proved by parol evidence, but that it may be allowed to explain words in a will, especially in this case, where it appears to be a mere blunder in the drawer: That this doth not intrench upon any of the rules with regard to parol evidence, but only clears up who was in

(*k*) 3 *Brown's Parl. Ca.* 607. 8vo. edit.

tended to have the personal estate, where the whole is devised to two different persons; and that it seems clearly to be a blunder in the drawer of the will, because the devise in the first part of it is proper only in the disposing of real estate. —— By the lord chancellor *Hardwicke:* As to the question, whether I ought to admit parol evidence to explain the intention of the testator, I am of opinion, that this is not a case in which parol evidence can be read, and would be of dangerous consequence: it is true, there are some things here which would make a judge wish to admit it; but I must not follow my inclinations only, for I do not know that upon construction of a will, courts of law and equity admit parol evidence, except in two cases: First, to ascertain the person, where there are two of the same name, or there has been a mistake in a christian or surname, and this upon absolute necessity; where if such evidence were not let in, it would make the will void. (9) The other case is, with regard to resulting trusts relating to personal estate; where a man makes a will, and appoints an executor, with a small legacy, and the next of kin claim the residue; in order to rebut the resulting trust for the next of kin, parol proof hath been admitted to ascertain the person who was to have the residue. (*l*) It is very true, cases may be cited where lord *Cowper* has admitted such evidence; for he went upon this ground, that it was by way of assisting his judgment, in cases extremely dark and doubtful. I have the greatest deference for his judgment, but
[135] must own I was never satisfied with this rule of lord *Cowper*'s of admitting parol evidence in doubtful wills; besides, he went further in the great case of *Strode* and *Russell* (2 *Vern.* 621.), in which there was an appeal to the house of lords; Mr. Justice *Tracey*, who assisted lord Cowper in that cause, was at first of

(9) A devise to one by the name of *Mary*, whose christian name was *Elizabeth*, is good, if the jury find from the circumstances that she was the person *meant* to be designated. *Doe* d. *Cook* v. *Davison*, 7 *East's Rep.* 299. Legacy to " James, son of Thomas A." There was no person of that description; but there was a " Thomas, son of James A." The court of chancery will not receive evidence to shew this to be a mistake in the description. *Andrews* v. *Dobson*, 1 *Cox*, 425. Again, where the words were, " I leave *to all* my grandchildren," the will was held void for uncertainty both in the subjects and object of the bequest: for though it was alleged that the mistake was made in writing " to all" for " all to," the court refused to insert or transpose words for the purpose of giving a meaning to an instrument which had none. *Mohun* v. *Mohun*, 1 *Swanst. Rep.* 201. 1 *Wils. Ch. Rep.* 151. And see *Bowman* v. *Milbanks*, 1 *Lev. Rep.* 130. Bequest of stock, not standing in testator's own name, but in that of trustees, parol evidence of the fact is admissible, and it will pass by the will. *Hewson* v. *Reed*, 5 *Madd. Rep.* 451.

(*l*) Vid. *Blinkhorn* v. *Feast*, 2 *Ves.* 27.

the same opinion with him, but upon considering it more, disavowed his first opinion, and was clear that it could not be admitted, and this alteration in his judgment was mentioned in the house of lords. In the case of *Selwin* and *Brown*, I was of opinion that it ought to have been admitted; and even lord Talbot, when he had heard the cause, had a remorse of judgment at the same time that he rejected the parol evidence: But the house of lords refused it as of most mischievous consequence, and affirmed his decree. In the present case, here is in the will undoubtedly a contradiction and repugnancy; for in the first place she has given all her personal estate to the plaintiff, and yet legacies come afterwards, and a devise of the residue. What then must be the construction? As to the general question, where the same thing is described generally, and given to two different persons in the former and latter part of a will, lord *Coke* was of opinion, the latter words shall revoke the former; but in *Plowden* (1) it is said they shall take as joint tenants. I own the reasoning in *Plowden* is not convincing to me; I rather incline to lord Coke's, though the latter cases have taken it otherwise. But no certain rule is to be laid down as to construction of devises: So says Swinburne, but that they must depend upon their particular circumstances. Upon the whole of what Swinburne says, the result is this: That if the same thing be given to two persons, they shall take as joint tenants, unless there is something to indicate and prove the intention of the testator to revoke and vary the devise. Now try the present case by this rule, and see if it doth not come exactly within it. The testatrix, by giving legacies after the devise of all the personal estate, has varied the will for so much. It is truly said, that a man may give the whole in a former part, and qualify it afterwards, and still the first legatee is intitled in part. But here, in case the whole personal estate should not be sufficient to pay the legacies, she charges the real estate with them, upon a supposition that the other might not be sufficient; and therefore is a plain indication of her intention in one event totally to revoke the devise of the personal estate. And there being an alteration of her intention before she finishes her will, the construction is, she hath altered her intention throughout, and the plaintiff is not intitled to any part of the personal estate, but the residue belongs [136] to the three daughters of Leonard Collard. And decreed accordingly. 2 *Atk*. 372.

And notwithstanding that wills are generally favoured by the law (2); yet where the testator endeavours to establish a settlement against the reason and policy of the common law, the judges will reject it. *Gilb*. 110. 2 *Bac. Abr*. 79.

(1) *Paramore* v. *Yardley*, p. 539., and see p. 181.
(2) More than any other deed. *Fisher* v. *Nicholls*, 3 *Salk. Rep*. 394.

Also where the testator by his will maketh no other disposition of his estate than the law itself would have done, had he been silent; there such a will is useless, and shall be rejected: and therefore if a devise be made to a person and his heirs, which person is heir at law to the devisor; this is a void devise, and the heir shall take by descent as his better title; for the descent strengthens his title, by taking away the entry of such as may possibly have right to the estate; whereas if he claims by devise, he is in as by purchase. *Gilb.* 110. 2 *Bac. Abr.* 79. (3)

Also devises are void and rejected, where the words of the will are so general and uncertain, that the testator's meaning cannot be collected from them; and therefore where a man by will gave *all* to his mother, the general words did carry no *lands* to his mother, for since the heir at law hath a plain and uncontroverted title, unless the ancestor disinherits him, it would be severe and unreasonable to set him aside, unless such intention of the testator is evident from the will; for that were to set up and prefer a dark and at best but a doubtful title, to a clear and certain one. *Gilb.* 112. 2 *Bac. Abr.* 81. (*m*)

[Wills referring to deeds.] [Wills frequently refer to deeds and other written instruments, which are then taken to be part of the will, and explanatory thereof. *Metham* v. *D. of Devon.*, 1 *P. Wms.* 529. 8 *Vin. Ab.* 45. *Ch. Rep.* 265. *Hawtree* v. *Trollop.*]

Clause of perfect mind and memory. The clause of *perfect mind and memory* is more usual than necessary in a will; and yet not hurtful. *Swin.* 77.

But in case of a contestation, it is necessary to prove the sanity of the testator. 2 *Atk.* 56.

[137] What words will pass a fee-simple, or a life-estate only. 13. A devise made *in fee-simple*, without express words of *heirs*, is good in fee-simple: But if a devise be made to A. B. he shall have the land but for term of life; for these words will carry no greater estate. *Terms of the Law*, tit. *Devise*. *Black. Rep.* 1045. (4)

If a man devise all his *estate* which he hath in such a place,

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(3) See *Hedger* v. *Rowe*, *H.* 1682. 3 *Lev.* 127, 128. *Moor*, 680. *Godolph.* 461. 1 *Rol. Abr.* 610. *Hob.* 30. *Lytton* v. *Lytton*, *M.* 1795. 4 *Bro. C. C.* 441.

(*m*) So where it was uncertain which of two limitations personal property directed to be laid out in land, and therefore considered as land, was to follow, it was decreed to the heir at law. *Leslie* v. *Devonshire*, 3 *Bro. C. C.* 188. [Where the literal force of expressions differs in a will, it must be a true rule to seek for the intention of the devisor rather in a consistent and rational, than in a contrary purpose; and more especially where the difference may arise only from the devisor not having present in his mind an event which is not in the natural order of things. *Jenkins* v. *Herries*, 4 *Madd. Rep.* 67.]

(4) And see *Co. Lit.* 4. *Pocock* v. *Bp. of Lincoln*, 3 *Brod. & B.* 27. 1 *Pri. Rep.* 353. S. C. *Doe d. Wood* v. *Wood*, 1 *B. & A.* 518.

without mentioning the heirs of the devisee; courts of equity have held, that it shall extend to such heirs, for that the word *estate* implies the whole property and interest therein: especially in the case of children, to whom the parent, unless there is some express limitation, cannot intend a life-estate only. By lord *Hardwicke*, in the case of *Bailis* and *Gale*, Nov. 6. 1750, 2 *Ves.* 48. (5)

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(5) The word "*estate*" or "*estates*" in a will carries the fee, unless coupled with words which shew a different intention. *Fletcher* v. *Smiton*, 2 *T. Rep.* 656. *Tilley* v. *Simpson*, *cor.* lord *Hardwicke*, *ib.* 659. *Bridgwater* v. *Bolton*, 1 *Salk. R.* 236. *Barry* v. *Edgeworth*, 2 *P. Wms.* 522. *Ibbetson* v. *Beckwith*, *Ca.* t. *Talb.* 157. *Tuffnell* v. *Page*, 2 *Atk.* 37. *Nicholls* v. *Butcher*, 18 *Ves.* 193. *Chorlton* v. *Taylor*, 3 *B. & V. Rep.* 160. And see all the *previous* cases on this subject, collected and reviewed by lord *Ellenborough*, in *Roe* d. *Child* v. *Wright*, 7 *East*, *R.* 259.; and see *Roe* d. *Allport* v. *Bacon*, 4 *M. & S.* 366. *Chichester* v. *Oxenden*, 4 *Taunt. R.* 176. *Randall* v. *Tuchin*, 6 *Taunt.* 410. 2 *Marsh.* 113. S. C. *Harding* v. *Gardner*, 1 *Brod. & Bing.* 72. *Gardner* v. *Harding*, 3 *B. Moore*, *R.* 565. *Semb.* overruling *Pettiward* v. *Prescott*, 7 *Ves. jun.* 546. "*All my estates in law and equity*" in a will passes personalty to be laid out in land. *Rashley* v. *Masters*, 1 *Ves. jun.* 204. "*Whatsoever else I have in the world not before by me disposed of*," and "*all I am worth*," passes real estate. *Hopwell* v. *Ackland*, 1 *Com. Rep.* 164. *Huxtep* v. *Brooman*, 1 *Bro. C. C.* 437. So "*property*" of itself carries the realty, though followed by "*goods and chattels*." *Doe* d. *Wall* v. *Langlands*, 14 *East*, *Rep.* 370. And see *Doe* d. *Andrew* v. *Lainchbury*, 11 *East*, *Rep.* 290. *Patton* v. *Randall*, 1 *J. & W. Rep.* 189. But this was held otherwise where there was no precedent reference to land, or introductory clause shewing any intention to dispose of the *whole* property; but on the contrary, in the introductory words of the will, the testatrix enumerated every article of personal property which she could recollect without saying any thing touching her land. *Doe* d. *Bunny* v. *Rout*, 7 *Taunt. Rep.* 79.; and see *Dally* v. *King*, 1 *H. Bla. Rep.* 1. "*Manors, messuages, lands, tenements, and hereditaments*," do not pass leasehold messuages, except devisor's evident intention appear so. *Thompson* v. *Lawley*, 2 *B. & P. Rep.* 303. But "*farm*" will if testator's intention appear. *Lane* v. *Stanhope*, Earl, 6 *T. Rep.* 345. "*House*" passes every thing occupied with it as proper and convenient for its occupation, though the word "*appurtenances*" be not added. *Doe* d. *Clements* v. *Collins*, 2 *T. Rep.* 502. "*Messuage with the appurtenances*" does not pass land usually occupied with a house, unless it is clear that the testator's intention was to extend the word "*appurtenances*" beyond its technical sense. *Buck* v. *Nurton*, 1 *B. & P. Rep.* 53. *Quære*, whether a devise of "*lands to* A. *after payment of my just debts and funeral expences*" carries the fee. 3 *Anst.* 781. Devise of "*a house to* A. *paying yearly and every year out of the said house the sum of* 15*s.* *to* B.," will carry a fee. *Goodright* d. *Baker* v. *Stocker*, 5 *T. Rep.* 13. But the word "*hereditaments*" alone was held insufficient to carry a fee; and an estate for life only passes.

If lands be devised to a man, to have to him *for ever*, or to have to him and his *assigns*; in these two cases, the devisee shall have a fee-simple: but if it be given by feoffment in such manner, he hath but an estate for term of life. *Terms of the Law*, tit. *Devise*.

If a man devise his land to another, to give, sell, or *do there-with at his pleasure* or will; this is fee-simple. *Id.*

A devise made to one and to his *heirs male*, doth make an estate tail: but if such words be put in a deed of feoffment, it shall be taken for fee-simple; because it doth not appear of what body the heirs male shall be begotten. *Id.*

If lands be given by deed to one, and to the *heirs male of his body*, who hath issue a daughter, who hath issue a son, and dies; there the land shall return to the donor, and the son of the daughter shall not have it, because he cannot convey himself by heirs male, for his mother is a lett thereto: but otherwise it is of such a devise; for there the son of the daughter shall have it rather than the will shall be void. *Id.*

If lands be given by deed to one and *his heirs for ever*, and *if he die without heirs* then to his brothers or sisters; this last is
[138] void, because the first gift conveyeth unto him the fee-simple; but in a will, such devise over is good, and such limitation shall convey but an estate tail: As in the case of *Tyte* and *Willis*, *M.* 7 *G.* 2. The testator devised his lands to his wife Jane for life, the remainder to his son Henry for life, remainder to his son *George and his heirs for ever*; and if he died *without heirs*, then to his two daughters *Katherine* and *Jane*. The question was, whether George took a fee-simple, or only an estate tail. And the case of *Webb* and *Herring*, *Cro. Ja.* 415., was cited, to prove that where a devise is to one and his heirs, and if he die without heirs, remainder over to another, who is or may be the devisor's heir at law, such limitation shall be good, and the first limitation construed an intail, and not a fee, in order to let in the remainder-man; but where the second limitation is to a stranger, it is merely void, and the first limitation is a fee-simple. And by the lord chancellor: In this case, George took an estate tail. The difference which hath been taken is right; and the reason of it is, that in the latter case there is no intent appearing to make the words carry any other sense than what they import at law; but in the former, it is impossible that the de-

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Denn d. *Moor* v. *Mellor*, 5 *T. Rep.* 558. 3 *Anstr.* 781. S. C. and S. P. Reversed in error in *Cam. Scacc.* on the ground that in that particular case there was a clear intent to convey the fee. 1 *B.* & *P.* 558. And see S. C. 6 *T. Rep.* 175.; also 8 *T. Rep.* 503. But affirmed in *Dom. Proc.* 2 *B.* & *P.* 47. 7 8vo. *Parl. Cas.* tit. WILL; and see *ante*, 109. *note.*

visee should die without an heir, while the remainder-man or his issue continue. And therefore the generality of the word *heirs* shall be restrained to heirs of the body; since the testator could not but know, that the devisee could not die without an heir while the remainder-man or any of his issue continued. *Cas. Talb.* 1.

But in the case of *Tilburgh* and *Barbut*, Mar. 2. 1748; where the remainder-man, being of the half blood, could never possibly inherit, it was decreed by lord *Hardwicke*, that this being a fee mounted on a fee, it vested in the first taker, and the remainder over to the half brother was merely void. 3 *Atk.* 617. 1 *Ves.* 89. (*n*)

If one devise to an *infant in his mother's womb*, it is a good devise; but otherwise by feoffment, grant, or gift: for in those cases there ought to be one of ability to take presently, or otherwise it is void. *Terms of the Law.* (*o*) [139]

If one devise to a person by his will *all his lands and tenements;* here not only all those lands that he hath in possession do pass, but all those that he hath in *reversion*, by virtue of the word *tenements*. *Id.*

If a man hath lands in fee, and lands for years, and deviseth *all his lands and tenements;* the fee-simple lands pass only, and not the lease for years: but if a man hath a lease for years and no fee-simple, and deviseth all his lands and tenements; the lease for years passeth, otherwise the will would be merely void. *Cro. Car.* 293. [*Rose* v. *Bartlett.* *Pistol* v. *Richardson*, 2 *P. Wms.* *n.* 459. (*p*)]

If a man seised of freehold lands, and of the legal estate of *copyhold* lands, makes a general devise of all his manors, messuages, lands, tenements, and hereditaments, but makes no *surrender of the copyhold lands to the use of his will;* the copyhold

(*n*) If a remainder be given by will after an estate tail, and the first estate never take place, the remainder vests in possession. Thus, if one devise to *A.* and the heirs of his body, and for default or want of such issue of *A.* to *B.*, and *A.* die in the lifetime of the devisor leaving issue, the estate shall go to *B.* and not to the issue of *A.* See *Hodgson* v. *Ambrose*, *Doug.* 337.; and *White* v. *Warner*, cited in *Dense* v. *Bagshaw*, 6 *T. Rep.* 512.

(*o*) 8 *Vin. Ab.* 85. [See as to Bastards, 131. *n.*]

(*p*) And in the former case the word *lands* may be explained by other words, so as to pass a leasehold interest; as, "all his lands which he then stood seised or possessed of, or any ways interested in, and which were in the possession of *A. B.*" *Addis* v. *Clement*, 2 *P. Wms.* 455. The word *farm* is sufficient to pass a leasehold estate, if such appear to have been the testator's intention. *Lane* v. *Earl Stanhope*, 6 *T. Rep.* 346.

lands will not pass. By lord *Hardwicke*, in the case of *Gibson* and *Styles*, July 18. 1741. (*q*)

The words (all my *lands*) in a devise, will pass a *house*; but the devise of a house doth not pass lands. *Mo*. 359.

A devise of a *messuage*, will carry with it a garden and curtelage; otherwise of a *house*, unless it be *with the appurtenances*. 2 *Cha. Ca.* 27.

The testator devised *a house with the appurtenances*. The question was, whether land in a field passed. And it was adjudged, that the land did pass; for it was in a will, in which the intent of the devisor should be observed. *Godb*. 40.

But in a like case where it appeared upon evidence, that the house was copyhold, and the land freehold; it was adjudged, that the land could not in that case be said to be appurtenant, although it had been used with it. *Cro. Eliz.* 704. [And see *Buck* v. *Nurton*, *ante*, 137. *note*. *Yates* v. *Clincart*.]

A devise of the *inheritance*, hath been held to be a devise of the lands. *Sty*. 308.

[140] If lands are devised to trustees, without the word *heirs*; yet by implication they must have an estate of inheritance sufficient to support the trust; for there is no difference between a devise to a man for ever, and to a man upon trusts which may continue for ever. 1 *Abr. Cas. Eq.* 176.

If lands are devised to a man, *paying several sums* in gross; he hath a fee, though all the sums together do not amount to the annual rent of the land: for the devise shall be intended for his benefit; and if he had only an estate for life, he might die before he received the legacies out of the land, and consequently be a loser. *Id.*

So if lands are devised to a man, in consideration that he *release a sum of money* due to him; he has a fee-simple, on his release of the debt: for the devise being intended for his benefit, an estate for life might be determined before he could receive the sum out of the land. *Id.* 177.

But if lands are devised to a man, paying so much out of the *profits* of the lands; he takes but an estate for life: for although he takes the land charged, yet he is to pay no farther than he receives, and so can be no loser. *Id.* (*r*)

(*q*) Vide 1 *Eq. Ca. Abr.* 124. *pl.* 14.

(*r*) See this distinction taken in *Collier*'s case, 6 *Rep.* 16. But if the expression "out of the rents and profits" be accompanied with other clauses which shew an intention to give a fee, the intention shall prevail. *Frogmorton* v. *Holiday*, 3 *Bur.* 1618. And if an estate is devised subject to an annuity, the fee shall pass, because the annuitant may survive the devisee. *Baddely* v. *Leppingwell*, 3 *Bur.* 1533.

A man devised that his lands should descend to his son, but he willed, that *his wife should take the profits thereof until the full age of his son for his education and bringing up; and died.* The wife married another husband, and died before the full age of the son. And it was the opinion of *Wray* and *Southcote* justices, that the second husband should not have the profits of the lands until the full age of the son; for nothing is devised to the wife but a trust, and she is as guardian or bailiff for the benefit of the infant, which by her death is determined; and the same trust cannot be transferred to the husband: but otherwise, if he had devised *the profits of the land unto his wife until the age of the infant, to bring him up and educate him;* for that is a devise of the land itself. 2 *Leon.* 221.

In the case of *Hogan*, lessee of *Henry Wallis*, esquire, and others, against *Rowland Jackson*, esquire, *T.* 15 *G.* 3. On a writ [141] of error from the court of king's bench in Ireland, the case was, the reverend George Jackson by his will devised as follows: "As to my *worldly substance*, I give and bequeath to my mother "Mary Jackson my house and lands of Glanbegg, and all their "appurtenances, for and during the term of her natural life, "and also my lands of Ballygally, subject only to the rent pay-"able thereout, for the term of her natural life, without liberty "of committing waste thereon:" And after several legacies and annuities, he gives all the *remainder* and *residue* of all his *effects* both *real* and *personal* to his said mother. The question was, whether under the residuary clause, all the testator's real estates undisposed of by the will passed to his mother Mary Jackson so as to enable her to devise the same to the lessors of the plaintiff.—And it was argued that they did. It is apparent that the great and chief object of the testator's bounty was his mother; therefore by way of securing a certain provision to her, he first gives her a life-estate in two denominations of his real property: He then proceeds to dispense his bounty amongst his other relations; and perceiving there was still a surplus undisposed of, by one general sweeping clause he devises to his mother every species of property he should die possessed of. And that he did not mean to die intestate, as to any part of his real or personal property, is manifest, not only from the strong language of the residuary clause, but from the introductory words of the will, *As to all my worldly substance*, which have always been understood to include both real and personal estate, and to indicate an intent in the testator who uses them, to dispose of all his property. And the several cases were cited, where words

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Doe [d. *Palmer*] v. *Richards*, 3 *T. Rep.* 356. *Goodright* v. *Stocker*, 5 *T. Rep.* 13. [*Andrew* v. *Southhouse*, 5 *T. Rep.* 292. *Randall* v. *Tuchin*, 2 *Marsh*, 113. 6 *Taunt.* 410. S. C.]

of the like import have always been understood to include all the testator's property. As *all my worldly estate*, all my *temporal estate*, all the *rest and residue of my estate*. —— On the other hand, three rules were laid down for the construction of wills. First, that an heir at law shall not be disinherited but by express words or necessary implication. Secondly, that the whole of the will must be taken together; and nothing is to be rejected which has a determinate and fixed meaning in itself. And thirdly, where words used by a testator are indifferently applicable to real and to personal estate, they shall not be applied to the real in disinherison of the heir at law. As to the first of these, that the heir shall not be disinherited but by express
[142] words or necessary implication, here is clearly no express devise of the real estate. The word *effects* is properly applicable only to personal estate. And as to the word *real* annexed to it, this can at most apply only to *chattels* real, which it appears the testator died possessed of. As to the second rule, that the whole will must be taken together; the word *estate* in the introductory part is a technical expression, and improperly applicable to real estates: but the meaning thereof is qualified by the word annexed, my *worldly* estate, which always is understood to signify worldly *substance*, without expressly limiting the extent or quantum of such disposition. Thirdly, the words "remainder and residue of my effects *both real and personal*" do not necessarily refer to real estate, but are equally applicable to personal; and if so, they shall not be extended to disinherit the heir at law. — By lord *Mansfield* chief justice: There is one point upon which the whole case turns, which is, to fix the meaning of the word *effects*. If it is equivalent to *worldly substance* used by the testator in the beginning of his will, or if it is synonymous to *property*, there is an end of the question: Because then, all the cases prove, that the sweeping clause passes a fee. On the contrary, if it can be shewn that *effects* mean *chattels or personalty only*, then the residuary clause can include them only. I take *effects* to be synonymous to *worldly substance*, which means whatever can be turned to value; and therefore, that *real and personal effects* mean all a man's property. His lordship added, As this cause has already been nine years depending in Ireland, and as the court has no difficulty upon the question, which turns upon the construction of a very few words of the will, I think it is right, that we should give our opinion directly, without adding further delay, by deferring it to a second argument. The question upon the construction of the will is, whether, by virtue of the sweeping clause, any real property at all passed to Mary Jackson, the mother of the testator; and, if any did, whether it can pass for a longer time than during the life of Mary Jackson, because there are no words of limitution. In a conveyance of

real estate by the common law, it is required, in order to pass a fee, that there be words of limitation in the donation or grant. Without the word *heirs*, general or special, no man can create a fee at common law. Afterwards, when wills were introduced, and devises of real property begain to prevail, being considered as a species of conveyance, they were to be governed by the same rule. Therefore by analogy to that rule, in the construc- [143] tion of devises, if there be no words of limitation added, nor words of perpetuity annexed, which have been held tantamount, so as to denote the intention of the testator to convey the inheritance to the devisee, he can only take an estate for life. For instance, if a testator by his will says, I give my lands, or such and such lands to *A.*; if no words of limitation are added, *A.* has only an estate for life: generally speaking, no common person has the smallest idea of any difference between giving a personalty and a quantity of land. Common sense alone would never teach a man the difference: but the distinction, which is now clearly established, is this: If the words of the testator denote only a description of the specific estate or lands devised; in that case, if no words of limitation are added, the devisee has only an estate for life. But, if the words denote the quantum of interest or property that the testator has in the lands devised; there, the whole extent of such his interest passes by the gift to the devisee. The question therefore is always a question of construction, upon the words and terms used by the testator. It is now clearly settled, that the words *all his estate* will pass every thing a man has: But if the word *all* is coupled with the word *personal* or a *local description*, there the gift will pass only personalty, or the specific estate particularly described. And having considered the whole of this will, including the introductory part, and the several particular bequests, and the general sweeping clause in the conclusion, his lordship gave his opinion, that the lessors of the plaintiff, the residuary legatee, are intitled, and therefore that the judgment of the king's bench in Ireland must be reversed. Unto which the other three justices assented. Afterwards, upon a writ of error in the house of lords, the judgment of the king's bench reversing the judgment of the court of king's bench in Ireland was affirmed. *Cowper*, 299.

Afterwards, in the case of *Loveacres*, on the demise of *Mudge*, against *Blight*, *M.* 16 *G.* 3. Lord *Mansfield*, in further explanation of the aforesaid rule, says thus: The principles by which this and other like cases must be governed, are settled by analogy to establish rules respecting the limitation of estates by deed at common law. If a man by deed of conveyance at common law gives land to another *generally*, without words of *limitation*, the donee has only an estate for life. But I really believe that almost every case determined by this rule, as applied to a devise

of lands in a will, has defeated the real intention of the testator. For common people, and even others who have some knowledge of the law, do not distinguish between a bequest of personalty and a devise of land or real estate. But, as they know when they give a man a horse, they give it him for ever; so they think if they give a house or land, it will continue to be the sole property of the person to whom they have left it. Notwithstanding this, where there are no words of limitation, the court must determine in the case of a devise affecting real estate, that the devisee has only an estate for life: Because the principle is fully settled and established, and no conjecture of a private imagination can shake a rule of law. But as this rule of law has the effect of defeating the intention of the testator, in almost every case that occurs, the court has laid hold of the generality of other expressions in a will, where any such can be found, to take the devise out of this rule. Therefore if a man says, I give *all my estate*, that has been construed to pass a fee; or, if even words of locality are added, as *all my estate in A.;* it hath been held that the whole of the testator's *interest* in such particular lands will pass, though no words of limitation are added. Because the law says, that the word *estate* comprehends not only the land or property which a man has, but also the *interest* he has in it. So in the case from Ireland, the court had no difficulty in saying, that the words *all my worldly substance*, in the introductory part of the will, meant every thing the testator had; and that the words *all his real effects*, in the subsequent residuary devise, were equivalent to *worldly substance*, and carried every thing to the residuary devisee. In general, wherever there are words and expressions, either general or particular, or clauses in a will which the court can lay hold of, to enlarge the estate of a devisee, they will do so to effectuate the intention. But if the intention of the testator is doubtful, the rule of law must take place. So if the court cannot find words in the will sufficient to carry a fee, though they should themselves be satisfied beyond the possibility of a doubt, as to what the intention of the party was, they must adhere to the rule of law. *Cowper*, 352.

Devise to a *feme covert*, to her separate use.

14. *H.* 1724. *Rollfe* and *Budder*. Devise of a bond by the son to his mother to her sole and separate use: It is her sole property in equity, and her assignment of it is good. *Bunb.* 187.

[145] So in the case of *Bennet* and *Davis, M.* 1725. A person seised of an estate in fee, devised it to the defendant's wife, who was his daughter, for her separate use, without any limitation to trustees: It was adjudged, that the husband was but a trustee for the wife. 2 *P. Will.* 316. [See *Beable* v. *Dodd*, 1 *T. R.* 193.]

Devise to

15. If a devise be made to a man, and to the heirs female of

his body begotten, and after, the devisee hath issue a son and daughter, and dieth: here the daughter shall have the land and not the son, and yet he is the most worthy person, and heir to his father. But because the will of the dead is, that the daughter should have it, law and conscience will so too. *Terms of the Law. Devise.*

heirs female.

Devise to one's relations.

16. A man devised his personal estate *for the use of his relations*, without specifying any in particular, or using any other words; and made an executor; and died. His mother and three sisters brought their bill as nearest relations, for a discovery and account of the personal estate, and to come in according to the statutes for distribution. And it was agreed to be the rule, in construction of such devises to relations, that those who would by the statutes for distribution be intitled to the personal estate, in case the testator had died intestate, should, upon such general devises, be admitted in the same proportion only. And the lord chancellor *Cowper* said, he thought it the best measure for setting bounds to such general words, and that it had been often ruled accordingly in that court. *Roach* and *Hammond, E.* 1715, *Pre. Cha.* 401. 2 *Abr. Eq. Cas.* 438. [*Anon.* 1 *P. Wms.* 327. (6)]

For if upon such general devise they were not to take in this manner, it would be uncertain; for the relations may be infinite. And in the case of *Carr* and *Bedford*, 30 *C.* 2., where the testator devised the residue of his estate *among his kindred according to their most need;* it was determined that this shall be construed according to the statute of distribution. 2 *Cha. Rep.* 146. 2 *Abr. Eq. Cas.* 365. (7)

(6) Such a devise speaks not at the time of framing it, but at that of the testator's death; therefore distribution under it must be made among those relations, as well on the maternal as paternal side, who are *then* entitled to share, or to their representatives. See, *per* lord *Ellenborough*, *Doe* d. *Garner* v. *Lawson*, 3 *East's Rep.* 290. 278. *Doe* d. *Thwaites* v. *Over*, 1 *Taunt. Rep.* 263. And see *Rayner* v. *Mowbray*, 1 *Bro. Ch. C.* 31. *Masters* v. *Hooper*, 4 *id.* 207.

(7) *Edge* v. *Salisbury*, *Ambl.* 70. *Goodridge* v. *Goodridge*, 1 *Ves.* 231. S. P. The rule is, that under such a bequest to poor relations or next of kin, those only can take who are within the statute. *Pyot* v. *Pyot*, 1 *Ves.* 335. *Withorne* v. *Harris*, 2 *Ves.* 527. *Green* v. *Howard*, 1 *Bro. C. C.* 31. *Rayner* v. *Mowbray*, 3 *id.* 234. *Smith* v. *Campbell*, 1815, *Coop. C. C.* 275. *Brandon* v. *Brandon*, *T.* 1819, 2 *Wils.* 14. And the words "*poor*" or "*poorest*," "*near*" or "*nearest*," being inserted, do not affect the rule. See the cases collected in *Brunsden* v. *Woolredge*, *Ambl.* 507. But a bequest to a brother to dispose among such of his *poor* relations as he should think fit, is *not* confined to the next of kin. *Supple* v. *Lawson*, *Ambl.* 729. *Mahon* v. *Savage*, 1803, 1 *Sch. & Lef.* 111. But where the *court* is called on to distribute in failure of the person so empowered, it will confine itself to relations within the statute of distributions. A relation who

So in the case of *Thomas* and *Hole*, *M.* 1734. A man devised 500*l.* to the *relations of A., to be divided equally between them.* A. had, at the testator's death, two brothers living, and several nephews and nieces by another brother. It was determined, that no relations should take by this description, that could not take by the statute of distribution. *Cas. Talb.* 251.

[146] Whether the *wife* is a relation in this respect, has been made a question. As in the case of *Davis* and *Bailey*, Feb. 8. 1747. The testator by his will gave the residue of his personal estate to his wife for life, remainder to such of his relations as would have been intitled by the statute in case he had died intestate. The wife claimed a moiety. By the lord chancellor *Hardwicke:* Relation here means kindred. The wife is not of kindred, nor a relation within the meaning of the statute.

And more particularly, in the case of *Worsley* and *Johnson*, *M.* 27 *G.* 2. The testator, seised in fee, deviseth his estate to his wife for life, remainder to another in tail, and for want of issue, the reversion in fee to be sold; with these words, *And my mind is, that the money arising from the sale be divided amongst such of my relations, and in such manner, as the statute of distributions directs:* Then he gave other legacies to his wife, and appointed her sole executrix, and died; leaving relations of his own blood, and his said wife, who married a second husband. Then the wife dies; and the second husband dies; and the tenant in tail dies without issue. The plaintiff brings his bill, as executor to the second husband, praying a sale of the estate, and a moiety of the money thence arising, as the representative of the second husband to the wife, who is intitled to it by the will, as a relation within the statute of distribution.——Lord chancellor *Hardwicke:* During the course of this cause, I have altered my opinion. The question arises on the words of the will referring to the statute of distribution, and depends upon the construction, which must be agreeable to the words, and to the intent of the testator to be from thence collected. The question is, what is the sense of the word *relation*, as used in this will. In a proper grammatical sense, it denotes a quality in the abstract: but in common sense, it becomes personal, and signifies the same as *my kindred.* Now *next of kindred* are the words in the statute to which he refers, and takes in only relations by consanguinity or by blood. Now it seems strange to say, that a man's wife is no relation to him: but she certainly is not in this sense, neither by blood nor affinity. The etymologists, when they speak of *consanguinity*, say, that it is, *vincu-*

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was poor at the time of testator's death, but became rich before distribution, is not entitled: nor is the claim of a poor relation dying before distribution transmissible to his personal representative. *Ib.*

lum personarum ab eodem stipite descendentium; and of *affinity,* they say, *uxor non est affinis, sed causa affinitatis.* And so the word appears to be used in our statutes: for if the wife was of kin to her husband, she would exclude all the rest, as being the [147] nearest of kin. So in the 21 *H.* 8. *c.* 5. the ordinary shall grant administration to the widow, or next of kin; which distinguishes the wife from the kindred. This perhaps would be too nice a construction of the will, unless the manifest intent of the testator would warrant it; for wills are to be construed according to common understanding, and not by nice grammatical distinctions. Now in this will he has made an ample provision for the wife; and whenever he gives her an interest, he expressly mentions her. It was probable that this remote contingency would not happen in her life; and he could never intend, that her representative, such as the executor of a second husband, should carry so considerable a share from his own blood. Suppose he had said, *my own relations;* he would certainly be construed to mean his relations by blood. Therefore in this strict sense of the words, the wife is not intitled to any share. And I continue in the same opinion I was of, in the case of *Davis* and *Bailey,* [1 *Ves.* 84.] which is expressly to this point. And therefore I dismiss the bill; but without costs. 3 *Atk.* 758. (*s*)

(*s*) *Green* v. *Howard,* 1 *Bro. C. C.* 31. The testator devised 4000*l. to his wife for her life, and after her decease to his own relations who should be then alive.* There were several legacies in the will to both first and second cousins, and the second cousins petitioned to be admitted to shares with the next of kin. And it was said, that to construe the will by the statute of distribution would be to make the testator die intestate. But by lord *Thurlow* C.: It would be difficult to draw a line in favour of the second cousins against those who are more remote: If you once go beyond the statute, it must extend to every person who can make any claim. It must be confined to the statute, that is, to one class under it; for the wife cannot claim, the statute providing for her by the name of wife. Therefore such a will is not totally inofficious *, for it shuts out the wife. So where the bequest was to all my relations; *Thomas* v. *Hole, Forrest.* 251. But where the testator has added other words to explain his intention, they have been allowed to prevail. Thus Hester Joyce by a codicil gave the residue to be divided between her *relations;* that is, the Greenwoods, the Everitts, and the Dows: The Everitts were not within the degree of relationship limited by the statute, but were deemed to take jointly with the Greenwoods and Dows, who were. 14 *Apr.* 1779, 1 *Bro. C. C.* 32. *n.*

Davenport v. *Harbury.* Testator by his will gave a legacy to Mary Davenport or her *issue.* And it was held, that *all descendants* should share and take *per capita* as joint tenants. 3 *Ves.* 257. On the particular construction of a will, the word "*issue*" was confined to

* *Quære,* inefficacious.

Devise to younger children.

17. If money be devised to younger children, where there are divers daughters and a son, and the son is by birth a younger child, but heir at law to the [a fair] inheritance; the son shall not be considered as a younger child, so as to take by the devise. 1 *Abr. Eq. Cas.* 202. *Bretton* and *Bretton,* 12 *C.* 2. (*t*)

In the case of *Beclé* and *Becle, H.* 1713. The testator, being tenant in tail, had power by deed or will to charge the lands with 2000*l.* for portions *for younger children, living at his death.* He had only two daughters, and the younger was born after his death. He charged the lands by his will for raising this 2000*l.* And the question was, whether it should be raised. It was objected that the *elder* daughter was not intitled to any part of it, because it was only to go to the *younger* children; and the *younger* daughter cannot claim any part of it, because she was not *living at the time of his death.* But by the lord chancellor *Harcourt:* The eldest daughter, though first born, when there is a son, hath been often ruled to be a younger child. Every one but the heir is a younger child in equity; and the provision which such daughter will have is but as a younger child's, in regard the son goes away with the land as heir: so here, the estate goes all to the remainder-man, who is *hæres factus;* and neither of the two daughters is heir. And as to the younger daughter, he said, it would be very hard in a court of equity, that a child,

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children. *Sibley* v. *Perry,* 7 *Ves.* 522. But the word "*issue,*" unconfined by any indication of intention, includes all descendants. *Leigh* v. *Norbury,* 13 *Ves.* 340.

(*t*) [3 *Cha. R. Mead* v. *Cave,* 1 *Ch. R.* 224. S. P.] Grandchildren may take under the description of children. [*Royle* v. *Hamilton,* 4 *Ves.* 437. *Reeves* v. *Brymer,* 4 *Ves.* 692.] But they are only intitled from necessity: as if the will would otherwise be inoperative: or where by other words, as "issue," it clearly appears that the word "children" was used, not in the proper, but in a more extensive sense. *Radcliffe* v. *Buckley,* 10 *Ves.* 195. [A devise and settlement in favour of children and grandchildren, shall not be so construed as to comprehend *great* grandchildren. *Per Grant* M. R. "Where there is a total want of persons properly answering the description, others who do not so completely answer it may be let in; grandchildren, for instance, under a liberal construction of the word '*children,*' if there are no children, but in no instance where there are. '*Issue,*' also is an ambiguous term; sometimes confined to children, and sometimes comprehending all descendants. (See *Bate* v. *Amherst, Raym.* 83. *Loddington* v. *Kyme,* 3 *Lev.* 431.) Clear words in the operative part of a clause are not to be construed by ambiguous terms in the introduction. (*Earl of Oxford* v. *Churchill, H.* 1814, 3 *Ves. & Bea. R.* 59. 69. See *note,* p. 131.) '*Heirs of the body,*' mean one person at any given time, but comprehend all the posterity of the *donee* in succession." (*Jesson* v. *Doe* d. *Wright,* 2 *Bligh's P. Cas.* 53.) Devise in trust for children of A.: A. has one child and several grandchildren: the child only shall take; but if not living, the grandchildren might. *Crooke* v. *Brooking, T.* 1689, 2 *Vern. R.* 106.]

because it happened not to be born at such a time, must therefore be unprovided for; but the law so far regards an infant *in ventre sa mere*, as in this respect to look upon it as living at the time of the father's death. 1 *P. Will.* 244.

18. Mar. 2. 1738, *Owen* and *Owen*. The testatrix devised the residue of her personal estate to her two nieces, *equally to be divided between them*, and appointed them executrixes accordingly. One of the nieces died in the life of the testatrix. The question was, whether a moiety of the residue should go to the next of kin, as undisposed of by the will; or the devise to the two nieces was a joint tenancy, and the whole residue should go to the surviving niece. By the lord chancellor *Hardwicke:* It is clear to me, that if both of the nieces had been living, the words *equally to be divided* would have made a tenancy in common, and not a joint tenancy; for though these words, in a strict settlement at common law, have never been determined barely of themselves to make a tenancy in common, yet in a will it is settled that these [149] words will make a tenancy in common, both with regard to real and personal estate. 1 *Atk.* 494.

Estate equally to be divided.

In the case of *Rigden* and *Valier*, Mar. 25. 1751. The question arose on a deed-poll which began in this manner: "To all "Christian people, &c. I George Everinden, in consideration of "natural love and affection, &c. and for the firm settling and "assuring of all my real and personal estate on my wife and "children after my decease, dispose thereof in the manner "following: I give, grant, and confirm to my daughter Margaret, "&c. [This was not in question.] Also I give, grant, and "confirm to my two daughters Margaret and Hannah the rents "and profits of the land called *W.* during the life of my wife, "equally to be divided betwixt my said daughters, paying to my "wife ———— *per annum;* and after her decease to them "and their heirs, *equally to be divided betwixt them.* Also, I "give, grant, and confirm to my five daughters all my personal "estate equally to be divided betwixt them, after all my debts "and funeral charges paid and satisfied." This deed was signed and sealed by George Everinden in the presence of three witnesses. He and his wife died. Hannah, one of the daughters, married Rigden, by whom she had the plaintiffs, and died. The question was, whether Margaret and Hannah took as joint tenants, or as tenants in common. If the latter; the plaintiffs, who brought their bill for an account of the rents and profits of a moiety of the estate given to Margaret and their mother Hannah, and claimed as co-heirs of Hannah, were right: If the former, the whole survived to the defendant Margaret as the survivor of her sister.—By the lord chancellor *Hardwicke:* This case depends upon a deed or writing, which, though executed as a deed, I am not sure was intended to take effect as such. It begins as

a deed-poll: but it is a disposition of the whole real and personal estate of Everinden, and to take place from his decease, and in consideration of the natural love and affection he bore to his wife and children. If it be not construed as a will, or covenant to stand seised, (and being in consideration of natural love and affection, though by a single deed without livery, it may be considered to be a covenant to stand seised,) it will be void, being without livery, and because a freehold cannot pass *in futuro*. But by way of covenant to stand seised, it may be good; for that operates not by transmutation of the possession, but the use re-
[150] mains in the grantor till taken out of him by force of the consideration. The present question arises upon a very litigated point in the books, though clear enough in one view. In a *will*, the words *equally to be divided* certainly create a tenancy in common, though this at first was doubted; nay, the words *equally*, or *share and share alike*, have the same effect. But it is said, that there is not sufficient authority to establish these words to make a tenancy in common in a *deed*, and that the books take the law to be otherwise. 'Tis true, the books do so generally. And yet there is no solemn determination that I can find, where it has been adjudged against a title, that the words *equally to be divided* will not create a tenancy in common in a deed. The only determination that hath been, was in the case of *Fisher* and *Wig* (*L. Raym.* 623. 1 *P. Will.* 14.), which hath been relied on as a judgment of the court of king's bench, that these words make tenancy in common in a deed. But it is objected, that this is a case of doubtful authority, being on the opinion of only two judges, against so great a man as lord chief justice *Holt*; and it is apprehended, too, that this judgment was afterwards reversed. I have made inquiry, and cannot find that it was, or that even a writ of error was brought: so that this judgment yet stands, and is so far an authority, that this construction in regard to the words *equally to be divided* making a tenancy in common, took place in the case of the surrender of the copyhold lands.—Another case has been cited at the bar, which, if rightly reported, is in point, 2 *Vent.* 361. But I have caused the register's books to be searched, and can find no decree to warrant the report: But notwithstanding this, there might have been such a case, and it is taken by *Gould* that there was.—Another case is mentioned at the end of *Fisher* and *Wig*, by *Northey*; but the records have been searched, and there is no possibility of finding it.—*Smith* and *Johnson* too is another authority, such as it is.—In regard to the case before me, upon the best consideration I can give it, I am inclined to be of opinion, that the deed or instrument, call it what you will, has created a tenancy in common; and that to say otherwise, would be a manifest contradiction to the intention of a father providing for his children. Though

none has a greater reverence for the opinion of lord chief justice Holt than I have, I think the arguments of the other judges are founded more on the reason and nature of the thing than his lordship's; and that his proceeded from the artificial and refined reasoning of the law, and are deduced from a great deal of fine [151] learning drawn from argument in other cases. The arguments of Mr. justice *Gould* have great weight, and are by no means satisfactorily answered. Indeed that case was on a surrender of copyhold lands in the lord's court; and the two judges argued it was not to be considered with great strictness, but as a will: whereas *Holt* contended that it should be construed as a deed; and in one thing he is certainly right, that the surrender of copyhold lands to uses is not to be considered on the foot of uses, being not within the statute of uses; and therefore such a surrender is only a direction of the lord whom to admit; and when admitted, the surrenderee is not in by the grant of the lord, but by the surrender. If the arguments of the judges had any weight in that case, they must have full as much in this, being on a covenant to stand seised. But it is objected, that there is no warrant to construe a deed to uses, as to the limitations and words of it, with greater latitude than a conveyance by way of feoffment, or any other conveyance at common law; and that strange confusion would arise, if the words of a deed on the statute of uses should be taken in a larger sense than they would bear in a conveyance at common law. This is true in general: for the statute joining the estate to the use, it becomes one intire conveyance by force of the statute. But some restriction must be added to this. The words of limitation, to be sure, must be construed in the same sense as at common law. But when there are words of regulation or modification of the estate (as the words *equally to be divided* are), and not words of limitation; I think there is no more harm in giving them a greater latitude in deeds on the statute of uses, which are trusts at common law, than in feoffments, which at all times have been strict conveyances. The case upon that occasion cited by *Gould*, is very material; where the intendment, not the words, of the special verdict influenced the determination. Consider the argument from thence to the present case. The only distinction taken between the construction of words in a special verdict and in other cases is, that in a special verdict, they may be taken more largely than in pleading; and therefore it is often said, that a description, which would be bad in a count or plea, may be good in a verdict, and taken by the intendment of the jury: but there never was any book that said, that words may be taken more loosely in a special verdict than in a deed. It is admitted, that if the deed had been in this manner, to hold one moiety to one and her heirs, and the other moiety to the other and her [152]

heirs, this had been good, not only in such a deed as this, but likewise in a feoffment. And considering how the sense of the words *equally to be divided* is to be construed, there is no reasonable difference between the two cases. Thus the matter stands on the foot and authority of *Fisher* and *Wig.*—But there are other reasons which greatly strengthen the present case in favour of the plaintiffs. The first is this: Here is a parent making a provision for his children (who were five in number), and for his wife: if the children were to take this estate intended for the support of each of them and their future families, as joint tenants, the share of any one, who should happen to die, would not descend for the maintenance of his children and posterity, but survive to the other joint tenants; a disposition by no means reasonable, nor likely to be supposed agreeable to the intention of the father. And this court has always used a great latitude in pursuing the intent of the parties, in construing a deed to make a tenancy in common or a joint tenancy, though the words *equally to be divided* have been omitted; and have determined therefore, that if two men jointly and equally advance a sum of money on a mortgage in fee, and take a security to them and their heirs, there shall be no survivorship; and so if they foreclose an estate, it shall be divided betwixt them, because their intention is supposed to be so. It has been said indeed, if two men make a purchase, they may be supposed to buy a kind of chance between them, and to intend that the survivor shall be intitled to the whole. But it has been determined, that if two purchase, and one advance more than the other; there shall be no survivorship, though there be no such words as *equally to be divided*, or to hold as tenants in common; which shews, how strongly the courts have leaned against survivorship, and erected a tenancy in common, by construction, or the intention of the parties. Consider how nearly this comes to the case in question. And this court always considers provisions for children, as having an equitable consideration. And therefore, though such voluntary dispositions cannot be preferred to debts for valuable consideration; yet they are always preferred to other voluntary dispositions.—But George Everinden has himself put his own construction on the words, by the disposition of his *personal* estate; which is allowed to make a tenancy in common.—Besides, this appears to be as
[153] near a testamentary act as possible; nor do I know why it may not be proved as a will, notwithstanding the solemnity of the execution by sealing and delivery: according to the case of *Kibbet* and *Lee* (*Hob.* 313.) and a late determination in the king's bench in the case of *Trimmer* and *Jackson.* (*u*) And it is admitted, that in a will, these words make a tenancy in common;

(*u*) *Vide supra*, 11.

and I think it ought to be so here. My opinion therefore at present is, that, agreeable to the case of *Fisher* and *Wig*, strengthened by the farther observations already made, the plaintiffs are intitled to a division of the estate. 2 *Ves.* 252.

So in the case of *Goodtitle* and *Stoakes*, in the king's bench: *H.* 26 *G.* 2. By indentures of lease and release, dated in the year 1695, and made between John Gurl and his wife of the one part, and William Purefoy and Peter Capper of the other part, the said John Gurl granted and released to the said Purefoy and Capper and their heirs, the lands in question, to the use of such and so many of the children of the said Gurl, on the body of his said wife begotten, in such manner, and in such shares, as the said John Gurl should appoint; and in default of such appointment, *to the use of all such children, equally to be divided:* with a remainder to the right heirs of the said John Gurl. — John Gurl died, without making any appointment, leaving his widow, and children, Richard, Jane, Peter, and Wilmot. —— The question was, whether by the words "*to the use of all such* "*children, equally to be divided*" the children took as tenants in common, or as joint tenants, in which case Wilmot, who married the defendant, being the only surviving child, would take the whole. —— *Lee* Ch. J. delivered the opinion of the court: This case depends upon the clause (above mentioned). The defendants have insisted, they ought to take as joint tenants. Joint tenants must be to the land in one right, and by one joint title, and they must have one joint freehold. Tenants in common take differently, as is laid down 1 *Inst.* §§ 292. 296, 297.; from which it does appear, that no particular words are necessary to create a tenancy in common. The question then comes to this, whether the children do not take several freeholds, with a several occupation. To make them tenants in common, would be to construe every word in this deed as operative. No words in a devise or a grant shall be construed void, if they can be [154] construed otherwise consistently. (3 *Lev.* 373.) There is no doubt at this time of day, but that the words *equally to be divided*, in a will, make a tenancy in common. In the case in *Cro. Eliz.* 443. 695. it was first determined to be so. There is no determination where in a deed to uses they will. It has been objected, they have a joint title in the freehold; and the words *equally to be divided* will not sever it: And though the statute of uses executes the use to the possession; yet it leaves the estate subject to the same uses: The intent cannot prevail here; and these words, in a conveyance at common law, would not create a tenancy in common. But the question here is not, whether the joint title is severed; but, whether any joint title is conveyed. If land be given to *A.* and *B.*, to hold one moiety to *A.* and his heirs, and the other moiety to *B.* and his heirs; they

take as tenants in common. And where the grantor, in the same clause, and *uno flatu*, uses the words *equally to be divided*; he intends to convey an equal property in the land, and to the fee, to each. This is the opinion of *Popham*, *Cro. Eliz.* 696., in his argument. I cannot think the clause here is nugatory, or of no effect. The intent of the party operates to pass the whole fee. There is no rule in law, to prevent the court from making a construction, according to the intent of the party, in a deed. The true reason, why the words, *equally to be divided*, make a tenancy in common, is from the apparent intent that the estate should be divided: And such a construction ought to be made, if there be no rule to the contrary; and no precise words are necessary. The case in 2 *Ventr.* 365. is in point: A covenant to stand seised to the use of *A.* for life; and after, to two, equally to be divided. 1 *Inst.* 191. *a.* If a verdict find that a man hath two parts of a manor, or the like, to be divided into three parts; they are tenants in common, by the intendment of the verdict: and if in a verdict, there is no reason why not in a deed. *Carth.* 343. *Leigh* v. *Brace*. A conveyance by way of use shall be construed as a will, with respect to the intention of the parties. The case of *Fisher* and *Wig* cannot now be departed from: it is mentioned in the case of *Philips* and *Stringer*, as if this judgment had been reversed; but it was not. The whole reasoning of *Holt*'s argument, in the said case of *Fisher* and *Wig*, is applied to the supposition of a conveyance at common law: but it does not from that appear what his opinion would have been
[155] upon a direct deed to uses as here. In the case of *Rigden* and *Valier*, lord *Hardwicke* Ch. J. declared, upon the best consideration he could give the case, that he was inclined to think that the words *equally to be divided*, whether in a will or deed, create a tenancy in common. —— And judgment was given for the plaintiff by the whole court.

And in the case of *Peat* and *Chapman*, Aug. 3. 1750. The testator devised all the rest and residue to be divided betwixt two. By Sir *John Strange*, master of the rolls: This must be understood to be *equally* divided, and is a tenancy in common; and by the death of one in the life of the testator, his moiety shall not survive to the other devisee of the residue, but be considered as undisposed of by the will, and divided among the next of kin, as if no devise thereof had been. 1 *Ves.* 542. (*v*)

(*v*) *Perkins* v. *Baynton*, 1 *Bro. C. C.* 118. Frances Nott gave by her will, "to S. B. and W. B. 1500*l.*, jointly and between them." W. B. survived S. B., and insisted that the joint legacy survived, and that he was intitled to the whole. But by lord *Thurlow* C.: The one word here is *jointly*, the other *between them*; they must be so put together as to effectuate the intent. In *Haws* v. *Haws*, 3 *Atk.*, it is laid down

19. A devise of all a man's goods and mortgages to his executors, is a good devise, and will pass all the lands mortgaged; for the equity of redemption passeth to the devisee. *God. O. L.* 477. *Cro. Car.* 37. Devise of mortgages passeth the lands.

But by a general devise of all lands, tenements, and hereditaments, a mortgage in fee shall not pass, unless the equity of redemption be foreclosed; and if after such devise made, a foreclosure is had, yet such estate shall not pass by those general words of lands, tenements, and hereditaments, because a foreclosure is considered as a new purchase of the land. The interest of the land must be somewhere, and cannot be in abeyance; but it is not in the mortgagee, and therefore must remain in the mortgagor. If a man devises his estate, and after makes a mortgage in fee, it is a total revocation in law, yet in equity it is a revocation only *pro tanto*. And the mortgagee, with regard to the inheritance, is a trustee for the mortgagor till a foreclosure. [156] 1 *Atk.* 605. 2 *Bac. Abr.* 83. (8)

20. By the word *lands*, an advowson will not pass: but by *hereditaments* it may. *Fortesc.* 351. Advowson tithes, fee-farm rents.

But fee-farm rents, portions of tithes, or any other right out of lands, will pass by a devise of *lands*. *Viner*, *Devise*, K.

21. Where lands are appointed to be sold, and it is not said by whom; the executor ought to sell, because he is the person intrusted with the execution of the will. *Law of Test.* 121. *Law of Ex.* 221. And a court of equity will compel the heir at law, and all other proper parties, to join in the sale. 1 *Atk.* 490. Lands to be sold. (w)

H. 26 *El. Vincent* and *Lee*. A special verdict was found, that A. was seised of certain lands in fee, and devised the same in tail, and if the donee died without issue, that his said lands should *be sold by his sons in law*, he in truth having five sons in law; one of his sons in law died in the life of the donee, and after the donee dieth without issue, and then the four of the sons in law sold the land: and it was adjudged, that the sale

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that if words are so inconsistent that they cannot stand to be reconciled together, the court must reject those words which are least consistent with the intention of the testator. The intent here was to give to each an usable interest, as it is a sum of money which resolves between them; and his lordship decreed, that the survivor was not intitled to the whole legacy.

(8) Nor will the legal estate in mortgaged premises pass by a general residuary devise by the mortgagee. *Duke of Leeds* v. *Munday*, *E.* 1797, 3 *Ves. R.* 348. But this seems otherwise of lands originally held under an old mortgage, though no release of the equity of redemption appears. *Att. Gen.* v. *Bowyer*, *E.* 1800, 5 *Ves.* 300. *Same* v. *Butler*, *id.* 339. *Same* v. *Vigors*, *E.* 1803, 8 *Ves.* 276. *Exp. Brettel*, 6 *Ves.* 571.

(w) *Vid. infra*, *Payment of debts*, 4. and 8.

was good, because they were named generally, by his sons in law, and the lands could not be sold by them all; and the words of the will, in a benign interpetation, are satisfied in the plural number, albeit they had but a bare authority. But if they had been particularly named, it had been otherwise. 1 *Inst.* 113.

But if a man deviseth lands *to his executors to be sold*, and maketh two executors, and the one dieth; yet the survivor may sell the land, because as the estate, so the trust shall survive. And so note a diversity between a bare trust, and trust coupled with an interest. 1 *Inst.* 113.

Yet in neither of those cases, albeit one refuse, can the other make sale to him that refused: because he is party and privy to the last will, and remaineth executor still. 1 *Inst.* 113.

And hereupon lord *Coke* says, his advice to them that make such devises by will, in order to make it as certain as they can, is, that the sale be made by his executors or the survivors or survivor of them, if his meaning be so, or by such or so many of them as take upon them the probate of his will, or the like. And it is better to give them an authority than an estate, unless
[157] his meaning be they should take the profits of his lands in the mean time, and then it is necessary that he devise, that the mean profits till the sale shall be assets in their hands; for otherwise they shall not be so. 1 *Inst.* 113.

For where the testator deviseth that his *executors shall sell his land*, there the land descendeth in the mean time to the heir: and until the sale be made, the heir may enter and take the profits. But when the land is devised *to his executor to be sold*, there the devise taketh away the descent, and vesteth the estate of the land in the executor, and he may enter and take the profits, and make sale according to the devise. And in such case, the executor is bound to sell so soon as he can; for that the mean profits taken before the sale shall not be assets; and therefore he might otherwise take advantage of his own laches. 1 *Inst.* 236.

[Resulting trust as to the surplus.]

Where there is a devise of lands to trustees to sell, to pay debts; the heir shall have the surplus. *Law of Test.* 114.

For whatever interest in, or profits out of a real estate, are undisposed of by a testator, the same shall descend to the heir; and he takes them, not by the will, or the intent of the testator, but they are cast upon him by the law, for want of some other person to take. *Cas. Talb.* 44.

Thus, the testator by will devised all his lands to trustees to sell and dispose of the money as he by writing should appoint; and for want of such appointment, to his four nephews. The testator by writing appoints his trustees to pay several sums to several persons, but not to near the value of the land. It was held, that the nephews should not have the residue, but that

the heir at law should have it, as an interest resulting, and not disposed of. *City of London* and *Garway*, 2 *Vern.* 571.

A person devised his real estate to his executors, to be sold for payment of debts; the surplus, if any be, to be deemed personal estate, and to go to his executors, to whom he *gave* 20*l. a piece*. It was decreed, that the surplus should be a trust for the heir at law: And the same was afterwards affirmed in parliament. *Countess of Bristol* and *Hungerford*, 2 *Vern. R.* 645. (*x*)

The testator devised to his nephew several lands, to hold to him and his heirs for ever, in trust to be sold for payment of all his debts and legacies, within a year after his death, and made him executor, but *gave him no legacy*. [158]

It was held, that their was no resulting trust for the heir at law; for then the executor, who is taken notice of as his nephew, would have nothing for his trouble. *Cunningham* and *Mellish*, *Prec. Ch.* 31. 2 *Vern.* 247.

If lands be devised *for payment of debts*; the executor may sell, though authority be not especially given him: but otherwise, if such devise had been for *legacies* only, or for raising portions, or the like; for in such case there had been no remedy but in chancery against the heir. 1 *Keb.* 14.

If lands be devised on trust, *out of the rents and profits* to pay debts and legacies; if the rents and profits will not raise it in a convenient time, the trustees may sell: for the words [*profits of lands*] especially when to pay debts or portions, imply any profits that the land will yield, either by selling or mortgaging. 1 *P. Will.* 415.

If lands be devised to be sold for payment of portions, and one of the children dies after the portion is due, and before the lands sold; the administrator of the child is intitled to the money. 1 *Vern.* 276.

For lands devised to be sold, or in trustees' hands, for payment of debts, portions, or the like, are to be deemed as money so far as there are any such to be paid: and so money devised to buy lands is to be deemed as lands. But with respect to the heir at law or residuary legatee, the lands so given in trust, or devised for payment of debts or legacies, shall be deemed as land; and he may, by paying the debts or legacies, pray a conveyance. 9 *Mod.* 170.

(*x*) Where a testator directs his real estate to be sold, and the produce blended with his personal, and wills the whole away, equally disregarding his heir and next of kin, if any of the legatees die before the testator, such part of their legacy as arose from the realty shall result to the heir at law, and such as arose from the personalty shall go to the next of kin. *Digby* v. *Legard*, before lord *Bathurst*, *P. Wms.* 22. *n.* *Akroyd* v. *Smithson*, 1 *Bro. C. C.* 503. *Robinson* v. *Taylor*, 2 *Bro. C. C.* 589. *Williams* v. *Coade*, 10 *Ves.* 500.

So if money be devised to be laid out in land, and settled on a man and his heirs; he may come into court, and pray to have the money, and that no purchase may be made; for no other has any interest in it. But if he die before it is paid or laid out in land, and the question is between the heir and executor, who shall have it; the heir shall have it, and it shall be considered
[159] as land: first, because the heir in all cases is favoured; and secondly, if the executor should have it, it would be against the words of the will, which gave it to the heir. *Prec. Cha.* 544.

The purchaser of land is in general not bound to look to the application of the purchase money. *Smith* v. *Guyon*, 1 *Bro. C. C.* 186. *et. n.*

Devise upon condition.

22. Devise of a rent-charge to his younger son, *towards the education and bringing him up in learning;* it is not conditional, and he shall have the rent, though not brought up in learning, and the words (*towards his education*) are only to shew the intent and consideration of the payment of the sum. 2 *Lev.* 154.

Devise of lands to his wife for life, remainder to his second son in fee; provided, if his third son shall within three months after the wife's death pay 500*l.* to the said second son, his executors, or administrators, then he devised them to the said third son and his heirs. The third son died, leaving the wife: Then the wife died. The heir of the said third son may enter upon the lands, upon payment or tender of the 500*l.* It is not a condition, but an executory devise. *M.* 5 *G.* *Marks* and *Marks*, 10 *Mod.* 420.

Note: *Executory* is said to be, where an estate in fee, created by deed or fine, is to be afterwards executed by entry, livery, writ, or the like. Estates *executed* are, when they pass presently to the person to whom conveyed, without any after act. And an *executory devise* is, where a future interest is devised, that vests not at the death of the testator, but depends on some contingency which must happen before it can vest. If a particular estate is limited, and the inheritance passed out of the donor, this is a *contingent remainder:* but where the fee by a devise is vested in any person, and to be vested in another upon contingency, this is an *executory devise.* And in all cases of executory devises, the estates descend until the contingencies happen. (*y*)

Devise: If my son and my two daughters die without issue of their bodies, then all my lands shall remain and come to my
[160] nephew and his heirs. Here no estate is devised to the son and daughters by implication; the words only import a designation or appointment of the time when the land shall come to the

(*y*) The reader will find much profound learning on this branch of law, conveyed in an elegant and perspicuous manner, in the writings of the late Mr. Fearne on Contingent Remainders and Executory Devises.

nephew; namely, when the son and two daughters shall happen to die without issue, and not before. For no estate being created to the son and daughters, the nephew can take nothing by way of remainder; for that must descend to the heir at law. A remainder cannot depend upon an absolute fee-simple, that being but the residue of an estate. For when all a man has of an estate, or any thing else, is given or gone away, nothing remains, and no other or further estate can be given or disposed; and therefore no remainder can be of an absolute fee-simple. Yet, in another respect, an estate in fee may be devised to one, and to be in another upon a contingency, as default of paying a sum, or such a one's dying without issue living the other, or such like. *Vaugh.* 259. 270.

A man devised his lands to one, and devised also that the said devisee should pay a rent to A., and that A. might distrain for it, and if the devisee fail of the payment of the rent, that the heirs of the devisor might enter. This is a good distress, and a good condition. 1 *Lev.* 269.

Devise to his wife: proviso, and my will is, that she shall keep my house in good repair; this is a good condition. So a devise of lands to one, paying 10*l.* to another, is a good condition. 1 *Lev.* 174.

Devise of 100*l.* to his wife, for and in discharge of her dower, is a condition that she shall not have the 100*l.* till she make a discharge of her dower. *Cro. Eliz.* 274.

If a man deviseth land to an executor to be sold; this amounts to a condition. 1 *Inst.* 236.

The mortgagee by will remits part of the mortgage money and all the interest, *if the rest be paid* within three years. If the mortgagor doth not pay within three years, he loses the benefit of the bequest. 1 *Cha. Ca.* 51.

If lands are devised in fee, upon condition that the devisee shall not alien; this condition is void: And so it is of a feoffment, grant, release, confirmation, or any other conveyance whereby a fee-simple doth pass. For it is absurd and repugnant to reason, that he who hath no possibility to have the land revert to him, should restrain his feoffee in fee-simple, of all his power to alien. And so it is, if a man be possessed of a lease for years, or of a horse, or of any other chattel real or personal, and give or sell his whole interest or property therein upon condition that the donee or vendee shall not alien the same; this is void: because [161]
his whole interest and property is out of him, so as he hath no possibility of a reverter; and if such condition should be good, it would oust him of all the power which the law gives him, which would be against reason, and therefore such a condition is void. 1 *Inst.* 223.

When the devise is to an infant, when he shall be born; or to

a daughter, when she shall be married; it shall descend to the heir in the mean time. 1 *Sid.* 153.

The testator, having the reversion of lands of which another was tenant for life, devised the lands to a man when he should marry his daughter. The tenant for life dies. The lands shall descend, until the devisee shall marry the daughter. 1 *Keb.* 802.

If executors or others who are put in trust by devise to sell, or the like, will not perform the trust; the heir may enter. *Br. Devise*, 46.

A devise of lands was made to the eldest daughter, paying 100*l.* to the second daughter, and 100*l.* to the third daughter; and if the eldest daughter did not pay the 100*l.* to the second daughter by such a day, then the testator devised the land to the second daughter, she paying her sister's portion by a certain day; and if she did not pay, then he devised the land to the third daughter. It was resolved, this was not in the nature of a mortgage, to be redeemable after the time of payment was over; but that the eldest daughter not paying at the time appointed, the second daughter should have the land, and the eldest had no relief. 2 *Freem.* 206.

The testator devised lands to one, upon condition to pay 30,000*l.* to his grand-daughter and heir at law; to wit, 1000*l.* a year for the first fifteen years, and 2000*l.* a year after, till the whole should be paid. Of which 1000*l.* being in arrear, the heir enters. It was resolved by *Cowper* lord chancellor, that the devisee of the lands should be relieved upon paying the 1000*l.* with interest; the court declaring, that they would relieve wherever they could give satisfaction or compensation for the breach of the condition. 1 *Salk.* 156. 2 *Vern.* 594.

Where the devisee, who is to perform the condition, is heir at law, *notice* of a condition must be given to him; because he having a title by descent need not take notice of any will, unless it be signified to him: But where the devisee is a stranger, and not heir, he must inform himself of the estate devised to him, and upon what terms, and must take notice of the condition at his peril. *Cart.* 94. 1 *Vent.* 200.

[162] **Devise tending to perpetuity.**

23. Devises, as well as other settlements which tend to introduce perpetuity, are void; for wills, though favourably expounded, are yet to be construed according to the common rules of the courts at law and equity: Hence it is, that a devise to John and his heirs, the remainder to Thomas and his heirs, is void: for that the law in no case will allow a limitation of a fee-simple upon a fee-simple; because by a devise to John and his heirs, the devisor hath transferred the whole estate to him, and then the limitation over must be impertinent and void, when the devisor before had given the whole estate. Nor can his devise be good by way of future interest, or a remainder to vest upon

a contingency; because no man can say when the heirs of John will fail: and to allow the remainder to Thomas to be good upon such a distant contingency, is to perpetuate the estate in the family of John, to preserve a remainder or interest in Thomas, which, probably, may never vest. *Gilb.* 116. 2 *Bac. Abr.* 80.

But though the law will not allow a present remainder to be limited upon a fee, yet a future contingent estate may be limited upon a fee, where the contingency upon which it is to vest is to happen in a short time: and, therefore, if a devise be made to John and his heirs, and if he die without issue, living Thomas, then to Thomas and his heirs; there nothing vests immediately in Thomas, because the whole estate is transferred to John; yet the limitation is good by way of executory interest or devise; because it is to vest on a contingency which is to happen on a life in being, therefore out of the inconvenience or danger of a perpetuity; because John is only tied up from alienating but for life, and his heirs are at liberty to dispose of it after the death of Thomas. *Gilb.* 116.

The utmost length that has hitherto been allowed for the contingency of an executory devise to happen in, is that of a life or lives in being, and one and twenty years afterwards. As when lands are devised to such unborn son of a feme covert as shall first attain the age of twenty-one, and his heirs; the utmost length of time that can happen before the estate can vest, is the life of the mother and the subsequent infancy of her son: and this hath been decreed to be a good executory devise. 2 *Blackst.* 174. (z)

[*Thelluson* v. *Woodford.* Testator devised his real estates, of the annual value of near 5000*l.*, and other estates, directed to be purchased with the residue of his personal estate amounting to above 600,000*l.*, to trustees and their heirs, &c. upon trust during the lives of the testator's sons *A.*, *B.*, and *C.*, and of his grandson *D.*, and of such other sons as *A.* now has or may have, and of such issue as *D.* may have, and of such issue as any other sons of *A.* may have, and of such sons as *B.* and *C.* may have, and of such issue as such sons may have as should be living at his decease, or born in due time afterwards, and during the life of the survivor to receive the rents and profits, and from time to time to invest the same in other purchases of real estates; and after the death of the survivor of the said several persons, that the said estates shall be divided into three lots: and that one lot shall be conveyed to the eldest male lineal descendant then living of *A.* in tail male; remainder to the second, &c. and all and every other male lineal descendant or descendants then living,

(z) Vid. *supra*, *Of what things*, 5.

who shall be incapable of taking as heir in tail male of any of the persons to whom a prior estate is limited, of *A.* successively in tail male; remainder in equal moieties to the eldest and every other male lineal descendant or descendants then living of *B.* and *C.* as
[163] tenants in common in tail male, in the same manner, with cross remainders; or, if but one such male lineal descendant, to him in tail male; remainder to trustees, their heirs, &c. The other two lots were directed to be conveyed to the male descendants of *B.* and *C.* respectively, in the same manner, with similar limitations to the male descendants of their brothers, and to the trustees in fee; and it was directed, that the trustees should stand seised, upon the failure of male lineal descendants of *A.*, *B.*, and *C.* as aforesaid, upon trust to sell and pay the produce to his majesty, his heirs, and successors, to the use of the sinking fund. The accumulation, till the purchases or sales can take place, to go to the same purposes. The trusts of the will were established, and the decree was affirmed by the house of lords upon appeal. 4 *Ves.* 227. 11 *Ves.* 112.

[But to prevent similar devises in future, the Stat. 39 & 40 *Geo. 3. c.* 98. was passed, by which the power of settling and devising property for the purpose of accumulation is restrained, in general, *to twenty-one years after the death of the testator.* It enacts, that no person shall, by any deed, will, or by any other mode, settle or dispose of any real or personal property, so that the rents and profits may be wholly or partially accumulated for a longer term than the life of the grantor, or the term of twenty-one years after the death of the grantor or the testator, or the minority only of such person as would, for the time being, if of full age, be entitled to the rents and profits during the time that the property is directed to be accumulated contrary to this act, shall go to such person as would have been entitled thereto, if no such accumulation had been directed: provided that this act shall not extend to any provision for the payment of debts, or for raising portions for children, or to any direction touching the produce of woods or timber. In *Griffiths* v. *Vere*, 9 *Ves. R.* 127., a direction for accumulation during a life was held to be good for twenty-one years after the death of the testator. Where a trust is created by will for an accumulation which goes farther than 39 & 40 *G.* 3. allows, it is void only for the excess. Thus where it is directed by the will to be made until the legatee's attainment of the age of twenty-one, and the legatee is not then born, it is good for twenty-one years. *Longdon* v. *Simpson*, 12 *Ves.* 295.]

If a man devise a *personal* chattel to one, the remainder of it to another; the first devisee hath the whole property, and may dispose of it as he pleaseth: for such chattels will bear no limitation over, because being commonly moveable things, they

are subject to be broken, worn out, or lost, in the compass of a life: and therefore it were ridiculous to suffer a limitation, which the nature of the thing will not bear. *Gilb.* 117.

But otherwise it is of a *real* chattel, as of an use: It was indeed formerly held, that such limitations of remainders of terms are void: but at length the court of chancery interposed, to rectify the rigour of the common law, and hath settled such remainders of terms to be good, where the settlement doth not tend to introduce perpetuity. *Gilb.* 118.

Therefore, if a term be devised to John and the heirs male of his body, provided if John dies without issue in the life of Thomas, then the term to go to another; this last limitation is good, because there is no danger of a perpetuity, for the contingency on which it is to vest is to happen within a life in being. *Gilb.* 118.

But if the limitation had been to John in tail, and the remainder over to another; here the last limitation had been void, because the whole property of the term being in John, the limitation over, which is to vest on the contingency of John's dying without issue, is too distant to expect: whereas in the former case, the limitation after the intail to John is good by way of future interest or executory devise, because it is to vest in the compass of a life, or not at all; and it doth not look like a perpetuity, to oblige John from alienating, because the estate will be free from the clog when the life is spent, and whoever is proprietor afterwards may dispose of it at pleasure. *Gilb.* 119.

E. 1731, *Fereyes* and *Robertson.* A man by his will deviseth his leasehold estate, and other his chattels real, to his son William, and to the issue of his body; and if he die without issue, to his son *B.* and the issue of his body; and if he die without issue, to *C.*, and so on. By the whole court: The whole interest vests in William, and shall go to his executors or administrators, and the limitations over are void. *Bunb.* 301.

But a lease assigned in trust for *A.* for life, remainder to *B.* for life, with remainder to twenty other persons all in being at the time, is good; because they are like candles all lighted at a time, and have an easy common probability of determination. [164] *Law of Test.* 99.

So to *A.* for life, remainder to his first issue for life, is good; because no vast uncertain distance of time. *Law of Test.* 99.

In general, it seemeth to be agreed, that where the devisee or grantee of a leasehold would be tenant in tail in case of a freehold, he shall have the whole interest in the leasehold, and all limitations over are void; but where he would be only tenant for life in case of a freehold, the limitation of the leasehold over will be good.

Money cannot be devised from one to another: as, for instance, the testator had three daughters to whom he devised 540*l.*, equally to be divided; and if any of them died without issue, her part to go to the survivor: one of them married, and died without issue; the husband exhibited a bill against the executor and the surviving sisters for his wife's part, being 180*l.* and had a decree; because a sum of money cannot be intailed. 2 *Ventr.* 349.

So in the case of *Butterfield* and *Butterfield*, Oct. 29. 1748; where money was devised to one for life, and the heirs of his body; and if he died without heirs of his body, then to go over: it was held, that the whole property vested in the first taker, the limitation being too remote. And it was said to be an established rule, that where personal estate is given for life, and then to the indefinite heirs of the body, there being no recovery by which the intail of personal estate can be barred, the first taker may dispose of it as he pleases: and though a personal cannot descend as a real estate, yet if it was intended to go in that course of descent, which would be an intail of land, the first taker has the absolute property, and the remainder over cannot take effect. 1 *Vesey*, 133.

[Devise of use of chattels personal.]

But the *use* of chattels personal may be bequeathed to one for life; and after, the *property* to another: so that if one will that *A.* shall enjoy the use of his household stuff during his life, and after that it shall remain to *B.*; this is a good devise thereof to *B.* But if the *property* of the thing be bequeathed to the first of them, then it is otherwise; for the gift of a chattel personal, though but for an hour, is a gift thereof for ever; provided that the testator make it absolute, and not conditional. *Swin.* a. 207. 1 *P. Will.* 651.

A devise of goods to *A.* for life, with remainder after the decease of *A.* to *B.* It was said to be now clearly settled, that it is a good devise to *B.*, and that *B.* may exhibit a bill against *A.* to compel him to give security that the goods shall be forth-
[165] coming at his decease: and it is all one whether the goods or *use* of the goods be devised for life. 2 *Freem.* 206.

M. 1696, *Hyde* and *Parrot.* The testator bequeathed all his household goods to his wife for life, and after to his son: It is a good devise over, and the same as if the devise had been only of the use of them for her life. And by lord *Somers*: It is a rule, where personal chattels are devised for a limited time, it shall be intended the use of them only, and not the thing itself. 2 *Vern.* 331.

M. 1702, *Hale* and *Burrodale.* A farmer devised his stock, which consisted of corn, hay, cattle, and the like, to his wife for life, and after her death to the plaintiff. It was objected, that no remainder can be limited over of such chattels as these,

because the use of them is to spend and consume them. But the master of the rolls said, the devise over was good; but said, if any of the cattle were worn out in using, the defendant was not to be answerable for them; and if any were sold as useless, the defendant was only to answer the value of them at the time of sale. And an account was decreed to be taken accordingly. 1 *Abr. Cas. Eq.* 361.

T. 1720, *Upwell* and *Halsey*. The testator, being possessed of a personal estate of the value of 333*l.*, having a wife and sister, but no issue, devised that such part of his estate as his wife should leave of her subsistence should return to his sister and the heirs of her body, and made his wife executrix. The wife married; and died, leaving her husband. The master of the rolls said, that it is now established, that personal things or money may be devised for life, and the remainder over; and that though it be true that the wife had a power over the principal sum provided it had been necessary, yet not otherwise. And he directed, that the master should inquire how much had been applied for the wife's subsistence, and the husband to account for the residue. 1 *P. Will.* 651. [S. P. *Hyde* v. *Parratt*, *ib.* 1.]

Where a man devises goods to go as heir-looms with such an estate, so far as by law they may; the court, to the end that the testator's intention may take effect, will decree a conveyance from him to whom they may come as personalty. *Barnard, Cha. Ca.* 54. (*a*)

[166] Devise to children yet unborn.]

24. A devise to one's children and grandchildren generally, refers only to such children and grandchildren as were living at the time of making the will; but if a devise were to one's children and grandchildren living at the time of the death of the testator, a child *in ventre sa mere* might in such a case be so far regarded as to be looked upon as living. [*Northey* v. *Strange*,] 1 *P. Will.* 342.

For a devise to an infant *en ventre sa mere* is good; and the freehold shall descend in the meantime. 1 *Roll's Abr.* 609. 1 *Lev.* 135.

So if a man devises lands to be sold, for the increase of children's portions; a child born since the will shall have a share. 2 *Cha. Rep.* 211. (*b*)

(*a*) Chattels, directed to go as heir-looms with an estate, vest absolutely in the first tenant in tail who comes into *esse*, and go to his representative. *Foley* v. *Burnell*, 1 *Bro.* 274. *Vaughan* v. *Burslem*, 3 *Bro. C. C.* 101.

(*b*) [*Coles* v. *Hancock*.] Devise to trustees to permit *T. C.* to receive the rents for his life, and after his death to sell the estate and divide the money amongst all and every the child and children of *T. C.*

So where a man conveyed a term for 500 years, upon trust to raise 1500*l.* for such child or children as he should have living at his death; and died, leaving no child, but his wife *enceinte* of a daughter, which was after born: it was decreed, that this daughter was a child living at his death, within the meaning of the trust. And the direction of a trust is not so strictly construed as the limitation of an estate at law; and in *Lutterel's* case, in lord *Bridgman's* time, a bill was brought on behalf of an invent *en ventre sa mere* to stay waste, and an injunction was granted. *Hale* and *Hale, Prec. Ch.* 50.

And by the 10 & 1 *W. c.* 16. Where any estate shall, by any marriage or other settlement, be limited in remainder to, or to the use of the first or other son or sons of the body of any person lawfully begotten, with remainder over to the use of any other person; or in remainder to, or to the use of a daughter lawfully begotten, with remainder over to any other person: any son or daughter of such person lawfully begotten, that shall be born after the decease of his father, may by virtue of such settlement take such estate so limited, in the same manner as if born in the lifetime of their father, although there shall happen no estate to be limited to trustees, after the decease of the father,

at the age of twenty-one. Sir *L. Kenyon* M. R. decreed that a child born after the death of testatrix shall take. *Congreve* v. *Congreve*, 1 *Bro. C. C.* 530.

[Under a devise " to *all* the children of *A.* except *B.*," a posthumous child is entitled. *Clark* v. *Blake*, *T.* 1795, 2 *Ves. jun.* 673. 2 *Bro. C. C.* 320. So where *A.* devised lands to be sold for increase of children's portions, a child born since the will shall have a share. *Coles* v. *Hancock*, 2 *Cha. R.* 211. So where *A.* gave 20*l.* a-piece to " *all* the children of his sister *B.*," this legacy extends to a child born after making the will, and before testator's death; the word " children" comprehending all. *Garbland* v. *Mayot*, *T.* 1689, 2 *Vern.* 105. 2 *Freem.* 105. S. C. But where a sum was given to be divided among " *children*," all who were born before the time of division shall take. *Pulsford* or *Jennings* v. *Hunter*, *H.* 1792, 3 *Bro. C. C.* 416. And on this general rule, a child by a subsequent marriage was included, notwithstanding a strong implication in favour of children by the prior marriage. *Barrington* v. *Tristram*, 6 *Ves.* 345. So where a specific sum was given by will among the six children of *A.*; *A.* had six children at the time, one more was born after testator's will, but before a codicil: the seventh takes no share. *Sherer* v. *Bishop*, 4 *Bro. C. C.* 55. A bequest to the child of which an unmarried woman is *enceinte*, without reference to any reputed father, is good, for the object is sufficiently pointed out by the description. *Gordon* v. *Gordon*, *H.* 1816. 1 *Meriv. R.* 141. *Evans* v. *Massey*, 8 *Pri. R.* 22. S. P.; and see *Wilkinson* v. *Adam*, 1 *V. & B.* 446. *Earle* v. *Wilson*, 17 *Ves.* 528.]

to preserve the contingent remainder to such after-born children until they shall come *in esse*. (c)

T. 11 *G.* 2. *Jones* and *Fulham*. The testator, being possessed of a term, devised it in these words: "To my wife for her life; "and after her decease, to such child as my said wife is now supposed to be with child and ensient of, and his heirs for ever: "Provided always, that if such child, as shall happen to be born "as aforesaid, shall die before it has attained the age of 21 "years, leaving no issue of its body; then the reversion of one-third part to my said wife, and the other two-thirds to my "sisters." The testator dying within a month after, the wife entered, and enjoyed during her life, but had no child or miscarriage. And upon her death the question was, whether, as no child had ever been born, the remainders, limited upon his dying under 21 without issue, could take effect. And after several arguments, it was held by the court of king's bench that they might; that though formerly there had been opinions to the contrary, yet according to the law now settled, the devise to the infant *en ventre sa mere* was well limited, and if any child had been born, would have passed the term accordingly. Secondly, that though no child was ever born, yet the remainders are notwithstanding good: for there being no devisee, the devise, though void only *ex post facto*, falls to the ground as much as if it had been void in its creation, and this lets in the remainders immediately: that though the clause by which the remainders are limited is in words, strictly speaking conditional, yet they do not make it a condition, but only a limitation. Lastly, that the contingencies must happen within a reasonable time; and therefore it may well operate by way of executory devise. And they said they had seen the decretal order in the court of chancery, by which it appeared that the same question, arising upon this same will, and concerning the same premises, came before lord *Harcourt*; and that he was of opinion, that the devise over of [168] the reversion in thirds to the wife and two sisters was good, notwithstanding the wife was not ensient with any child. *Vin. Devise*, L. 53.

25. The father settled a lease, with reference to his will: in which he gave 500*l.* to each of his daughters, to be paid at the — In what case maintenance

(c) In *Reeve* v. *Long*, *Salk.* 228. 3 *Lev.* 408. The objection, that there were no trustees to preserve contingent remainders, and that therefore the freehold must be in abeyance, prevailed in the opinion of all the judges. The house of peers, perhaps influenced by the hardship of the case, reversed the judgments of the courts below, and soon after procured this statute to be passed, to settle the point. See Ld. *Kenyon*'s opinion in *Lancashire* v. *Lancashire*, 5 *T. Rep.* 60. See also 1 *T. Rep.* 634. *Hargr. Co. Lit.* 298. *n.* *Bul. N. P.* 105.

shall be implied. age of twenty-one; and if any or all died before that age, then to others; but devised no maintenance to them till their portions became payable: By the court, A maintenance cannot be decreed, because of the devise over. 1 *Chan. Cas.* 249. 3 *Salk.* 127.

But if there is no devise over, the court will decree a maintenance in the meantime: Thus in the case of *Harvey* and *Harvey*, *E.* 1722, the father seised of a real estate, and possessed of a personal estate, and having several children, deviseth all his real and personal estate to his eldest son, charging the same with 1000*l.* a-piece to all his younger children, payable at their respective ages of twenty-one; but in the will no notice is taken of maintenance for the younger children in the meantime. The younger children bring their bill, in order to recover interest, or some maintenance during their infancy. Upon which the master of the rolls, having taken time to consider of the case, and having been also attended with precedents, decreed, that the younger children should recover maintenance. He observed, that these being vested legacies, and no devise over, it would be extreme hard, that the children should starve, when entitled to so considerable legacies for the sake of their executors or administrators, who in case of their deaths would have the said legacies: That in this case the court would do, what in common presumption the father, if living, would (nay ought to) have done; which was, to provide necessaries for his children. 2 *P. Will.* 22.

Household stuff. 26. It is usual in wills to devise all the household stuff; by which words plate about the house, and not for ornament, passeth; but books, cattle, clothes, coaches, corn, carts, ploughs, waggons, and any thing fixed to the freehold, will not pass by that word. *Swin.* a. 185.

Household goods and furniture. 27. By a devise of household goods, plate will pass. 2 *Vern.* 628. 3 *Atkyns*, 370.

T. 1727, *Nichols* and *Osborne*. The testatrix devised all her household goods to *J. S.* The question was, whether by the devise of the household goods the plate should pass. Though it was reported on a reference to a master, that there were mani-
[169] fest intentions and declarations of the testatrix, that she did not intend the plate should pass; yet the master certifying that the plate was commonly used in the house, all the evidence touching the intention of the party was rejected, there being a complete and plain will in writing, which must not be altered or influenced by parol proof. 2 *P. Will.* 419. (9)

(9) S.P. In *Masters* v. *Masters*, *E.* 1718, 1 *P. Wms.* 424. See *Lillcott* v. *Compton*, 2 *Vern.* 638. *Nicholls* v. *Osborn*, 2 *P. Wms.* 420. *Snelson* v. *Corbett*, 3 *Atk.* 370. *Kelley* v. *Powlett*, *Ambl.* 605. Request of "the use of a house with all the furniture, stock of carriages and horses,

If a man deviseth 1200*l.* to J. S., and by general words deviseth all his goods, chattels, and household goods in and about his house to the said J. S.; money in the house will not pass, he having a particular legacy devised to him. *Swin.* a. 185.

By a devise of jewels, plate, pictures, medals, and furniture; it was decreed by lord *Hardwicke*, that *a library of books* did not pass under the word "furniture." 3 *Atk.* 202. (*d*)

"All his goods," what it implies.

28. It is usual likewise to devise all the goods moveable and immoveable: Now by the civil law, actions and rights of actions pass by the word "moveables," especially when the words of universality are repeated in the will; as, I give to T. S. all my moveable goods and immoveable, of what kind soever, or wheresoever found. *Swin.* a. 185.

One deviseth all his goods; and whether a debt by bond passed to the devisee was the question: Decreed by lord chancellor *Cowper* that it did; that these words seemed at common law to pass a bond, and to extend to all the personal estate; but this being in the case of a will, and a will relating to a personal estate too, it ought to be construed according to the rules of the civil law: now the civil law makes *bona mobilia* and *bona immobilia* the *membra dividentia* of all estates: *bona immobilia* are land, *bona mobilia* are all moveables; which must extend to bonds;

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and other live and dead stock, for life:" plate was held to pass, but not wine and books. *Porter* v. *Tournay*, 3 *Ves.* 311. By the words "other effects" in general, is meant effects *ejusdem generis;* and money therefore cannot be said to be *ejusdem generis* with plate, linen, and household goods; neither can "stock" be held to pass by the name of money. *Hotham* v. *Sutton*, 15 *Ves.* 326. *Boon* v. *Cornforth*, 2 *Ves.* 277. S. P. As to the word "things," see *Boon* v. *Cornforth*, *id.* But a bequest of the furniture and pictures at the houses of *A.*, *B.*, and *C.*, will not pass plate which the testator constantly used, and removed with him when he went from one house to another. *Franklyn* v. *E. of Burlington*, *Pre. Ch.* 251; S. C. reported *contra*, in 2 *Vern.* 512. As in *Jesson* v. *Essington*, *Pre. Ch.* 207. See also *Laud* v. *Devaynes*, 4 *Bro. C. C.* 537. *contra;* and see note (*g*).

(*d*) [*Bridgman* v. *Dove*, *Kelly* v. *Powlett*, *Ambl.* 605. S. P.] Under a bequest of *household furniture*, plate in the house at the testator's death, whether in common use or not, if suitable to the rank of the testator, pictures hung up, linen, and china, will pass; but books in a library will not. *Sir G. Kelly* v. *Powlett*, *Amb.* 605. Neither will jewels *occasionally worn* pass by the bequest of "a cabinet of curiosities," although usually shewn with it. *Cavendish* v. *Cavendish*, 1 *Bro.* [*C. C.* 467. 1 *Cox*, 77. Where current coin is curious, and kept with medals, it shall pass as such. *Bridgman* v. *Dove*. Devise of "furniture at *A.*," part is removed by devisor to *B.*: that will not pass. *Heseltine* v. *Heseltine*, 3 *Madd. R.* 276.]

and therefore by the devise of all the testator's goods, a bond must pass. 1 *P. Will.* 267. (*e*)

[170] By a devise of all his goods, a lease for years will pass, if there be not some other circumstance to guide the intent of the devisor. *Swin.* a 200.

But where a man devised to his niece *all his goods, chattels, household stuff, furniture, and other things which then were, or should be in his house at the time of his death*, and died, leaving about 265*l.* in ready money in the house; it was decreed, that this ready money did not pass; for by the words *other things* shall be intended things of like nature and species with those before mentioned. *M.* 1729, *Trafford* and *Berridge*, 1 *Abr. Eq. Cas.* 201.

So where a man devised so much of his *personal estate as should be and remain on such an estate at his death*; and there were, amongst other things, corn, household goods, plate, and 400*l.* in money; it was decreed by the lord chancellor *Hardwicke*, that all stock on the farm, live and dead, and all stores on the lands, did pass, but that the 400*l.* did not pass by the devise. *Incledon* and *Northcote*, Mar. 2. 1746, 3 *Atk.* 437. (*g*)

(*e*) But where the testator gave to "R. M. all his goods and chattels in Suffolk," and died, having goods and chattels there, and also in other counties, lord *Thurlow* C. held that a *bond* found in Suffolk did not pass, because though accounted *inter bona notabilia* of the diocese where it is found (1 *Ro. Ab.* 909.), being a *chose in action* it has not the *locality* which can attach it to a particular place. *Moore* v. *Moore*, 1 *Bro. C. C.* 127. See also *Chapman* v. *Hart*, 1 *Ves.* 271.; where lord *Hardwicke* says, that such a devise relates to the death of the testator; and the goods if removed before, (except contingently, as for fear of fire, or by the owner being ordered from ship to ship,) do not pass. See also *Green* v. *Symonds*, 1 *Bro.* 129.; [and see 111. *note.*]

(*g*) But ready money in a house, (including bank notes,) if not an extraordinary sum, will pass by a devise of all things in the house. *Prec. in Cha.* 8. *Chapman* v. *Hart*, 1 *Ves.* 271. [*Popham* v. *Lady Aylesbury*, *Ambl.* 68. S. P.] *Stuart* v. *E. of Bute*, 11 *Ves.* 657.

[Again in *Timewell* v. *Perkins*, 2 *Atk.* 103., a gift of "plate, jewels, linen, household goods, and coach and horses, will be confined to things of the same nature; and notes and bills will not pass by such words. See 1 *P. W.* 303. 2 *Ves.* 279. 2 *Atk.* 113. Nor will a devise of "all household goods, and all implements of household," pass the malt, hops, beer, ale, and other victuals in the house; or the guns and pistols, if used as arms in riding or shooting game: but the clock, if not fixed to the house, will pass. *Slanning* v. *Style*, 3 *P. Wms.* 334. "China" passes under the word "furniture," unless in a bequest by a shopkeeper. *Hele* v. *Gilbert*, 2 *Ves. R.* 430. "Running horses" pass under "all goods and chattels soever, in and

So where a man devised to his wife *all his household goods and other goods, plate, and stock, within doors and without,* and bequeathed the *residue* of his personal estate to another, it was decreed, that the testator's ready money and bonds did not pass by the word *goods:* for if the words were to be taken in so large a sense, it would make void the bequest of the *residuum;* and therefore the words *other goods* should be understood to signify things of the like nature with *household goods*, that the whole will might have its effect. 3 *P. Will.* 112.

29. Chattels are of two kinds, real and personal. Real chattels are such as concern or savour of the realty; as terms for years of land, the next presentation to a church, and the like. Chattels personal (which are what are commonly to be understood when goods and chattels are given by will) are properly things moveable, which may be annexed to or attendant on the *person* of the owner, and carried about with him from one part of the world to another. Such are animals, household stuff, money, jewels, corn, garments, and every thing else that can properly be put in motion, and transferred from place to place. 2 *Blackst. b.* 2. *c.* 24. Chattels. [171]

By a devise of all his chattels, the devisee shall not have glass of the windows, wainscot, tables dormant, fats in the brewhouse fixed to the freehold, nor furnaces, nor the box or chest where the testator's evidences are; nor doves in the dove house, nor fishes in the pond, nor deer in the park: for these things belong all to the heir. *Curs.* 181.

30. If a man seised of land for life, or in fee, or in tail, in his wife's right, or his own, sows it with corn or any manner of grain, and dies before severance; it shall go to the executor of the husband, and not to the wife or heir that shall have the land. *Went.* 59. *Swin.* 214. 2 *Inst.* 81. *Hob.* 132. "Land," implies the corn growing thereon.

But where a man was seised of land in fee, and sowed the land, and *devised* the same, and died before severance; it was adjudged, that in this case the devisee should have the corn, and not the executors of the devisor; for the devisee, in relation to the chattels belonging to the land, is put in the place of the executors, by the words of the will. *M.* 20. *Ja. Spencer*'s case, *Winch.* 51. *Swin.* a. 183.

So if a man seised in fee sows copyhold lands, and surrenders them to the use of his wife, and dies before the severance; it seems that the wife shall have the corn, and not the executors of the husband: for this is a disposition of the corn, it being appurtenant to the land: and since the husband hath disposed

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about the dwelling-house." *Gower* v. *Gower*, *Ambl.* 612. 2 *Eden.* 201.]

of it during his life, it cannot go to his executors. 1 *Roll's Abr.* 727.

And the reason why the corn passeth to the donee as appertaining to the soil when the property of the soil alters, and yet shall not descend to the heir, as appertaining to the soil when the property of the soil remains in the first owner, is this: Because every man's donation shall be taken most strongly against himself; and therefore it shall pass not only the land itself, but the chattels that belong to the land. But no chattels can *descend* to the heir, and therefore they go to the executor. *Gilbert's Law of Evid.* 250.

So if land be *sold*, the corn growing shall go to the purchaser of the land, unless specially excepted. *Went.* 59.

[172] A person seised in fee sows the land, and after grants it to *A.* for life, remainder to *B.*; *A.* enters, and dies before the corn is severed: His executors or administrators shall not have the crop, because he was not at any charge or industry, but *B.* shall have it. *Hob.* 132.

Generally the distinction seemeth to be, where the estate is determined by the act of the party himself, and where it is determined by the act of another.

And therefore *Littleton* saith, if the lessee, being *tenant at will*, sow the land, and the lessor after it is sown, and before the corn is ripe, put him out; yet the lessee shall have the corn, and shall have free entry, egress and regress, to cut and carry away the corn, because he knew not at what time the lessor would enter upon him. Otherwise it is, if *tenant for years*, who knoweth the end of his term, sows the land, and his term ends before the corn is ripe; in this case, the lessor, or he in the reversion, shall have the corn, because the lessee knew the certainty of his term, and when it would end. *Litt.* § 68.

And the reason why the tenant at will shall have the corn is, because his estate is uncertain; and therefore lest the ground should be unmanured, which would be hurtful to the public, he shall reap the crop which he sowed in peace, albeit the lessor doth determine his will before it be ripe. And so it is, if he set roots, or sow hemp, or flax, or any other annual profit; if after the same be planted, the lessor oust the lessee, or if the lessee dieth, yet he or his executors shall have that year's crop. But if he plant young fruit trees, or young oaks, ashes, elms, or the like, or sow the ground with acorns; there the lessor may put him out notwithstanding, because they will yield no present annual profit. —— And this is not only proper to a lessee at will, that when the lessor determines his will, the lessee shall have the corn sown; but to every particular tenant that hath an estate uncertain. And therefore if tenant *for life* soweth the ground and dieth; his executors shall have the corn: for that

his estate was uncertain, and determined by the act of God.— And the same law is of the *lessee for years of tenant for life.*— So if a man be seised of land *in the right of his wife*, and soweth the ground, and he dieth, his executors shall have the corn, and if his wife die before him, he shall have the corn. But if husband and wife be joint tenants of the land, and the husband soweth the ground, and the land surviveth to the wife; it is said that she shall have the corn. —— So if a woman seised in fee or for life sows the land, and then takes a husband, and he dies [173] before the severance, the wife shall have the profits, and not the executors of the husband: for the corn committed to the ground is a chattel real, which is annexed and belonging to the freehold; and not a chattel personal, annexed to the freehold and transferred. And therefore if the husband doth not dispose of it during his life, it belongs to the wife, and not to the husband. ——— So if the husband sows the land, and dies before severance; the wife shall have the third part of the land so sown for her *dower:* for she shall be in the best possession of her husband, above the title of the executor; and it would be unreasonable, if her husband had all corn land, that she should stay for her subsistence for a whole year, till the crop should be renewed.— If a man seised of lands in fee hath issue a daughter, and dieth, his wife being *ensient* with a son; the daughter soweth the ground; the son is born; yet the daughter shall have the corn, because her estate was lawful, and defeated by the act of God; and it is good for the commonwealth that the ground be sown. But if the *lessee at will* sow the ground with corn, and after he himself determine his will, and refuseth to occupy the ground; in that case the lessor shall have the corn, because he loseth his rent. And if a woman that holdeth land *during her widowhood*, soweth the ground, and taketh husband; the lessor shall have the corn, because the determination of her own estate grew by her own act.— But where the estate of the lessee being uncertain is defeasible by a title paramount; or if the lease determine by the act of the lessee, as by forfeiture, condition, or the like: there, he that hath the right paramount, or that entereth for any forfeiture or the like, shall have the corn. ——— So if a *disseisor* sow the ground, and sever the corn, and he who is disseised re-enter, he shall have the corn, because he entereth by a former title; and severance or removing of the corn altereth not the case: for the regress is a re-continuation of the freehold in him, in judgment of law from the beginning. 1 *Inst.* 55. 2 *Inst.* 81. 1 *Roll's Abr.* 727.

Devise in restraint of marriage.

31. Generally, by the ecclesiastical law, all conditions against the liberty of marriage are unlawful, as being a restraint on the natural liberty of mankind, and an hindrance to the propagation of the species.

So if the condition be, that the legatee marry according to the appointment, arbitrament, or consent of some other person, this is rejected as unlawful. *Godolphin's Orphans' Legacy*, 45.

[174] But if the conditions are only such as whereby marriage is not absolutely prohibited, but only in part restrained, as in respect of time, place, or person; then such conditions are not absolutely to be rejected. *God. O. L.* 45.

So if the condition be, not to marry before the age of twenty years, this condition is to be performed; otherwise, if it is continued to an unreasonable length.

So if the condition be, not to marry such a particular person, or a widow, or of one particular place, or the like. (*h*)

(*h*) The ecclesiastical law has borrowed this doctrine from the Roman law, in which the *Lex Julia de Maritandis Ordinibus*, introduced by Augustus *, made all conditions prohibiting marriage void, and conferred rewards and honours on those who had numerous families of children. The necessity of enacting this law we collect from the historians and satirists to have been a singular love of celibacy which pervaded the rich, who were induced to remain unmarried by the respect which was paid them by all who wished to share their inheritance. Petronius observes, "In this city no one educates children." And in *A. Gellius*, i. 6., we find Metellus Numidius gravely advising his countrymen to marry; because, "though they cannot "live comfortably with their wives, it is impossible they should live "without them entirely, and they should therefore prefer their lasting "welfare to a short gratification." So great a corruption of manners required the interference of the legislature. It is agreed that a condition, restraining a person who had never been married, from marriage generally, was by this law rendered void, and the legacy vested absolutely; but a legacy to a widow, on condition *that she should remain a widow*, might be claimed by her if she married within a year, swearing that she did so for the sake of procreating children; but after the lapse of the year she was compelled to give security for the performance of the condition. This *Justinian* altered in his code, 6. 38. 2. & 3., permitting widows in such cases to marry, *maritorum suorum interminatione spretâ;* though he changed his opinion in the novels, and required them in all such cases to give the *cautio mutiana*, which bound them to restore the legacy if they broke the condition. *Nov.* 22. *c.* 43. But though by the law of the Digest and Code, conditions prohibiting marriage in general were set aside, thus, *Si non nupserit — si in viduitate permanserit, — si nupserit Titio scil. indigno, — si arbitratu Titii nupserit,* — Patri *si filia quam in potestate habet non nupserit,* — filio familias *si pater ejus uxorum non duxerit; Dig.* 35. 1. *passim;* and this though the legacy were given over, thus, *Titia restituat si nubat; Ib. l.* 22.; yet the following conditions were allowed,

* This law was also called *Julia Papia, Papia Poppæa,* and in the Code *Julia Miscella;* which various names were probably given to different chapters of it. See *Cujac Paratit. in Cod.* 6. 40.; and *Legis Romanæ,* subjoined to *Calvin's Lexicon.*

[*Perrin* v. *Lyon*. In this case, the will of the testator contained this proviso: "If my wife or daughter should marry a *Scotchman*, either of them so marrying shall forfeit all benefit and advantage under my will; and the estates given to such my wife or daughter as shall so marry, shall descend to such person or persons as would be entitled under my will, in the same manner as if my wife or daughter were dead." The court of K. B. held such partial restraint of marriage to be legal. 9 *East's Rep.* 173.]

[175] Generally in the temporal courts, the distinction seemeth to have been, where the legacy is devised over to another, and where it is not devised over: in the former case it hath been held, that the restraint shall be good, so as the legacy shall not be due, unless the condition be performed; but in the latter case, where there is no devise over, it hath been held, that the proviso or condition is only *in terrorem*, to make the person careful, but not to defeat the legacy. 1 *Cha. Ca.* 22. 1 *Vern.* 20. 2 *Vern.* 293. 357. (*i*)

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as appears by the same title; Filiæ meæ *cum nupserit — si cum Titio nupta erit — si neque Titio neque Seio neque Mævio nupserit, — si Ariciæ non nupserit,* — Titio, *si Seium uxorem duxerit* — uxori, *si a liberis impuberibus ne* (non) *nupserit, — dum cum filio meo erit — dum cum filio meo Capuæ erit.* *Dig.* 32. 3. 30. § 5. And the reason is, that the testator in the latter cases seems to regard the care and education of his children rather than to enjoin perpetual widowhood: and though a condition restrictive of marriage generally was void, yet one deferring it to a certain day, or making it to depend on some contingency, if not in fraud of the law, was allowed. *Dig.* 35. 1. 72. § 5.; *with the Com. of M. Pothier ad Pand. in Nov. Ord. digestæ*, No. 33. If these restraints on marriage were thought reasonable in the civil law, they must appear much more so in ours, which does not provide with equal anxiety against improper and unequal marriages; especially as that excessive love of celibacy has not yet been experienced in this country, and it has become the policy of the law to protect the property of young persons till they arrive at an age of discretion which may enable them to take care of it themselves. Nevertheless, in *Long* v. *Dennis*, 4 *Bur.* 2052, lord *Mansfield* and the other judges agreed, that conditions in restraint of marriage ought to be construed with the utmost rigour and strictness.

(*i*) See, however, the case of *Scott* v. *Tyler*, *post*. And note: It has been decided that where there is an alternative gift, as 10*l*. a-year at all events to a grand-daughter, but if she marries with the good liking of trustees, 150*l*. in lieu of the annuity; if she marry without such consent, equity will not relieve so as to give the larger portion. *Gillet* v. *Wray*, 1 *P. Wms.* 284. A devise of the residue has also been holden tantamount to a devise over of the specific legacy. *Scott* v. *Tyler*, 2 *Bro. C. C.* 431. But where the condition of marrying is annexed, it is necessary that the marriage should take place to vest the legacy, although the consent of particular persons should be dispensed with. *Garbut* v. *Hilton*, 1 *Atk.* 381. *Atkins* v. *Riccocks*, *ib.* 500.

Also in the temporal courts a distinction is made where a portion is charged on the personalty, and where it is charged on land. If it is charged on the personalty, they follow the rule of the ecclesiastical court, which hath jurisdiction as to the personalty; but if it is charged on land, of which the ecclesiastical court hath no jurisdiction, they follow the rule of the common-law courts, which on non-performance of the condition will not suffer the portion to be raised. (*k*) In the case of *Harvey* and *Aston*, Apr. 30, 1737; Sir Thomas Aston, by settlement after marriage, created a term in trust by mortgage or sale to raise 2000*l.* for each of his daughter's portions, "provided they marry "with their mother's consent; and if either die before marriage "with such consent, her portion to cease, and the premises to "be discharged; and if raised, then to be paid to the person to "whom the premises should belong:" and afterwards by will created another trust term to augment their fortunes 2000*l.* a piece more, but *subject to the condition as in the settlement*, and gave the residue over and above 2000*l.* a piece to his wife: and by a codicil created another trust term for the better raising of his daughters' portions. Sir Thomas died, leaving issue two daughters. One of them married after the age of twenty-one, and the other before the age of twenty-one, and both of them without the consent of their mother. Sir Joseph *Jekyl*, master of the rolls, decreed the portions to be paid. But on appeal from this decree, the lord chancellor *Hardwicke*, assisted by the two chief justices *Lee* and *Willes*, and the chief baron *Comyns*, reversed the decree; and argued, first, that it is the right and liberty of the subject, who makes a voluntary disposition of his own property, to dispose of it in what manner, and upon what terms and conditions he pleaseth. Secondly, that it is an established maxim of law, that if an estate in land, or interest out of the land, is limited to commence upon a condition precedent, nothing can vest or take effect, till the condition is performed. And this is so strong and so settled a point, that although the previous act was at first impossible by the act of God, or other ac-
[177] cident, the estate can never vest. Thirdly, that it is most agreeable to the rules of equity, to direct the execution of the trust according to the intent of him who appointed the trust. — It is said, that a trust is to be construed favourably, and it is true it is to be construed with as much advantage as may be to make good and answer the intent and design of the party; but it is to be construed strictly with regard to the execution of the trust: and therefore it would be a strange thing, when the trust directs

(*k*) *Add,* Or if it be raised, and the condition subsequent be broken, will divest the estate. 1 *Roll. Ab.* 418. *pl.* 6. *Fry* v. *Potter,* 1 *Cha. Ca.* 138.

the trustees to pay the money at the time of the daughter's marriage with her mother's consent, that the court should direct them to pay the money before that time. Fourthly, that a restraint in the present case is not only lawful, but prudent and reasonable; and no consequence more likely to ensue from it, than the hindrance of an inconsiderate or imprudent marriage. *Comyns*, 744. *Cas. Talb.* 212. 1 *Atk.* 361.

T. 1743, *Pulling* and *Reddy*. By the lord chancellor *Hardwicke:* If a legacy be given to a woman upon this condition, that she marry with the consent of a third person, and there be no devise over in case she marry without such consent; this is only to be considered *in terrorem:* but if there be a devise over, then it shall go to whom it is so devised over. This rule is taken from the civil law, as this court hath a concurrent jurisdiction as to legacies. But if a portion be to arise out of land, and there is no devise over, in that case she shall not have it, but it shall go to the heir; for the spiritual court hath no jurisdiction as to lands. There may be some doubt (he said) where money is given to be laid out in lands. 1 *Wilson*, 21.

May 5, 1746, *Reynish* and *Martin*. Elizabeth Philips by her will devised her real estate to her daughter Martha and her heirs for ever; and then says, "If my daughter Mary marry "with the consent of the trustees (therein particularly named) "or the major part of them, signified in writing before such "marriage had, then and not otherwise I give and devise to my "said daughter Mary the sum of 800*l.*:" And after comes a clause, "And I do hereby charge all my aforesaid real estate "with all my debts of all kind, and with all my legacies." The testatrix died, leaving issue the said two daughters Martha and Mary. Mary married Thomas Reynish the plaintiff, without the consent of the trustees. And the bill was brought by Thomas Reynish, as representative and administrator of Mary his wife, [178] for an account of the personal estate, and that the same might be applied in payment of the said legacy of 800*l.*; and in case the personal estate should not be sufficient, that then the real estate, or so much thereof as will make good the deficiency, might be sold, and the money arising therefrom applied for that purpose. This case coming on to be heard at the rolls, the personal estate not being sufficient, Fortescue, master of the rolls, decreed the real estate to be sold for payment of the legacy. The defendants appealed from the decree, and the cause now standing for judgment, lord *Hardwicke* delivered his opinion to the following effect: First, I will consider this as if it had been a mere personal legacy, and payable out of the personal estate. Secondly, I will consider it as if it had been charged on the real estate originally. As to the first, I apprehend, that taking this as a mere personal legacy, the plaintiff by the rules of the civil and

ecclesiastical law, and which have been constantly adhered to in this court, will be intitled to the legacy; for it is an established rule in the civil law, and has long been the doctrine of this court, that where a personal legacy is given to a child on condition of marrying with consent, this is not looked on as a condition annexed to the legacy, but as a declaration of the testator *in terrorem:* And indeed the civil law makes such conditions void, notwithstanding the legacy be given over, but that has not been received so in this court; but whenever the legacy is given over for breach of the condition, the gift over shall take place upon this foundation, because it thereby appears clearly that the person to whom it was given over, was in the mind and contemplation of the testator at the time of making his will; but in the present case there is no such gift over. The second consideration is, what the consequence will be, taking this legacy as a charge originally laid upon the lands, and not merely personal. In the will it is first of all a personal legacy, issuing out of personal estate; but then the testatrix afterwards, at the close of her will, charges all her real estate with all her debts and legacies. If it had been originally charged upon the land, and given upon the condition before-mentioned, it could not have been contended that the plaintiff could have recovered it after breach of the condition; and indeed it would be contrary to the rule of the common law (to decree for the plaintiff), which always
[179] favours the heir, and contrary to the determination in *Harvey* and *Ashton*, for the difference taken there is, that this court follows the rule of the civil law, because that was the original jurisdiction for the recovery of personal legacies; but whenever land is in question, or to be affected, this court followeth the rule of the common law; and in all cases, whereof this court takes cognizance of suit, where the original jurisdiction arises in another court, the rule of this court is always to follow the law of that other court; for if this court did not pursue that rule, there would be different remedies in different courts, which would create great inconvenience, and the rule of right in different courts would be different. But though this be so in the case of a personal legacy, it is not so in regard to lands affected or charged with legacies, because the property of land must be governed by the law of England; and where it is a legacy charged upon land, it must have the same consideration as a devise of the land itself would have had. And I am of opinion, if this case stood as an original charge upon land, the plaintiff could have no right to demand it. But this being an original personal legacy, the plaintiff is intitled to have an account of the personal estate of the testatrix, but not of her real estate. But as the personal estate may be exhausted by the payment of debts and legacies, the next question will be, whether this court cannot

marshal the assets in such a manner, as to give the plaintiff a remedy out of the real estate: And as the real estate is expressly charged with the payment of all debts and legacies, and this legacy, by the event which has happened, falls out to be a charge upon the personalty only; I am of opinion, that the plaintiff ought to stand in the place of such creditors or legatees as have received a satisfaction out of the personal assets: And to order it so, is the constant rule and practice of this court. 3 *Atk*. 330. 1 *Wilson*, 130.

In the case of *Needham* and *Vernon*, 25 *C*. 2., lands were devised in trust for raising portions for daughters, payable upon their marriages with consent of the trustees; but if they married without consent, then to remain over to another. The daughters were old, and never intended to marry, but to lay out their portions in a purchase of annuities for their lives. And it was held that they should have their portions immediately, upon giving security to indemnify against the persons to whom the portions were devised over.—And the like hath been decreed, upon giving security to refund, if the condition should be broken. 1 *Abr. Eq. Cas*. 111.

[In *Scott* v. *Tyler*, 2 *Bro. C.C.* 431., the testator Richard Kee [180]
directed his trustees to purchase 10,000*l*. South-Sea annuities, and willed that one moiety of that stock should be transferred to his good daughter Margaret Christiana Tyler, of whom he was the putative father, at her age of twenty-one years, if she should then be unmarried, and the other moiety at her age of twenty-five years, if she should then also be unmarried; but in case she should marry before twenty-one *with consent of her mother*, he directed certain settlements to be made; and in case she should die before twenty-five unmarried, he gave the 10,000*l*. to the mother, whom he also made residuary legatee. The daughter, who had other property given her by the will, married under twenty-one against the consent of her mother, who entered into trade and became a bankrupt; and the question was between the daughter and the assignees of the mother. *Per* lord *Thurlow* C. after full argument: "An injunction to ask consent is "lawful, as not restraining marriage generally; a condition that "a widow shall not marry is not unlawful. An annuity during "widowhood; a condition to marry or not marry Titius is "good.(*l*) A condition prescribing due ceremonies and place "of marriage is good: still more is a condition good which only "limits the time to twenty-one, or any other reasonable age, "provided it be not used evasively as a cover intending to re-"strain marriage generally. And it is agreed on all hands, that

(*l*) *Stone* v. *Theed*, 2 *Bro. C. C.* 243.

"(however restrictive of marriage) when the legacy is given over "to other uses, the testator shall be deemed to regard those "uses. I am of opinion, that the daughter having married at "eighteen, improvidently (as far as appears) and against the "anxious consent of the mother, never came under the description to which the gift of the 10,000*l.* South-Sea annuities was "attached: it is therefore void, and part of the residue, and belongs to the assignees of the mother."]

Condition not to give trouble to the executor.

32. If a legacy be given on condition not to dispute the will, and the legatee commenceth a suit whereby he disputes the validity of the will, yet this is no forfeiture of the legacy, if there was probable cause of contesting it. 3 *Bac. Abr.* 479.

And even although there be no probable cause; yet where a legatee, or other person interested, hath a right to see the will proved in solemn form, his making use of that right cannot (as it seemeth) be deemed a disturbance.

[181] *E.* 1724, *Nutt* and *Burrel.* The testator gives to *B.* a legacy, on pain of forfeiture of it in case he should give his wife (whom he made executrix) any trouble in relation to his estate. *B.* brings a bill against the wife, for which there was very little colour, and amongst other things demands his legacy. The chancellor was of opinion that the suit was very frivolous, but would not declare the legacy forfeited. *Cha. Ca. King*, 1.

But in the case of *Cleaver* and *Spurling*, *T.* 1729, a person by his will gives a legacy to his daughter, provided that if she or her husband refuse to give a release, or put the executor to any trouble, the same *shall go over to her sister's children.* The daughter and her husband (being within the custom of the city of London) sue for her orphanage part. Decreed, that the legacy was forfeited; for however it might have been construed to be intended only *in terrorem*, yet being devised over, and by that means a right to this legacy being vested in a third person, a court of equity could not devest it or call it back again. 2 *Peere Will.* 528.

H. 1710, *Webb* and *Webb.* The father gave a legacy of 40*l.* to his son, upon condition that he should not disturb the trustees. They applied to the court for an execution of the trust, and that he might either join with them in a sale, or lose the legacy. And it was decreed accordingly, by Harcourt lord chancellor. 1 *P. Will.* 136. [But Mr. Coxe, in his note to this case, observes, that such conditions are considered to be merely *in terrorem*, and therefore void, unless the legacy be given over, as in *Cleaver* v. *Spurling*. *Litigation*, in the sense of the condition, means vexatious litigation, when there is not *probabilis causa.* See *Ingram* v. *Strong and others*, 2 *Phil. R.* 294.]

Things

33. It is said by some, that if land be devised to one, and after

in the same will to another, they shall take it as joint tenants. *Gilb.* 159. (l)

devised twice.

But by lord *Coke*, The last devise taketh place; the same being for so much a countermand of the former part of the will. And of this opinion was lord *Hardwicke* in the case of *Ulrich* and *Lichfield* above mentioned, though (he said) the later opinions have taken it otherwise. 1 *Inst.* 112. 2 *Atk.* 372.

But as to this, it seemeth that no certain rule can be laid down; but the determination will vary according to the particular circumstances in each will. 2 *Atk.* 374. (*m*)

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Things which a person hath jointly with another.

34. A devise by one joint tenant of land devisable, which he holdeth in fee at his death, jointly with a stranger, is not good; But if such devisor doth survive all his companions, then such devise is good. *Perk.* 219.

Also a man cannot bequeath by will any of those goods or chattels which he hath jointly with another, though by act in his lifetime he might dispose of his part; if he bequeath his portion thereof to a third person, the legacy is void, and the survivor shall have the whole, notwithstanding the will. But joint merchants are to be excepted out of this rule: for the wares, merchandizes, debts, or duties which they have as joint merchants or partners, shall not survive, but shall go to the executor of him that dies; and this by the law of merchants. *Law of Test.* 188.

And by the custom of the city of London, he which holdeth

(l) *Ante*, p. 135.; and *dictum* in *Fane* v. *Fane*, *H.* 1681. 1 *Vern. R.* 30. *acc.* But a devise of lands to *A.* is revoked by a devise of the same lands to *B.* a papist: for though the last is void as a will, it is good as a revocation. *Roper* v. *Constable*, 8 *Vin. Ab.* 141. *n.* to *pl.* 2. 2 *Eq. Ab.* 771. *pl.* 8. *Roper* v. *Radcliffe*, *E.* 1714. 10 *Mod.* 233. 1 *Bro. P. C.* 450. Where a man devised lands in fee, and then leased the same to a third person; this is a revocation only *pro tanto*. *Perkins* v. *Walker*, *M.* 1682, 1 *Vern. R.* 97. See *Coke* v. *Bullock*, *Cro. Jac.* 49.

(*m*) If a testator give a pecuniary legacy to *A.* by his will, and in a codicil also give the same *A.* a pecuniary legacy, the legatee is entitled to both sums, except a contrary intention can be collected from the will; but if the same specific thing, as a horse or diamond, be twice given to the same person, it cannot from its nature be doubled. *Ridges* v. *Morrison*, 1 *Bro. C. C.* 389. *Hooley* v. *Hatton*, *ib.* 390., *with the authorities there cited.* [*James* v. *Semmens*, 2 *H. Bla.* 313. *Ingram* v. *Strong and others*, 2 *Phill. R.* 312. S. P.] If the same sum of money be twice given to the same person in one writing, the presumption is that one legacy only was intended. And where, in different codicils to a will, legacies have been repeated in such a manner as to shew that the codicils were meant as substitutions for one another, the legatee has been decreed to take under the last only. But this being a question of presumed intention, parol evidence has been admitted to prove the contrary. *Duke of St. Alban's* v. *Miss Beauclerk.* 2 *Atk.* 636. *Campbell* v. *Radnor*, 1 *Bro. C. C.* 271. *Coote* v. *Boyd*, 2 *id.* 521.

tenements in London jointly with others, may devise that which belongeth to him, without any other severance. *Privileg. Lond.* 145.

In what cases a legacy shall be said to lapse.

35. Generally, *if the legatory die before the legacy be due, the legacy is extinguished.* Insomuch that if the testator by his last will do bequeath his lands and tenements to a man and his heirs; yet if such person die before the testator, the devise is merely void, and his heirs cannot recover the land by force of the will; because the devisee was not in being when the will should take effect: and the word "heirs" in this case is not a designation of the person who shall take, but a limitation of the estate; for if it was a description of the person, then his widow would be endowed. *Plowd.* 345. *Swin.* 35. 560. *Law of Test.* 230.

And so it is, if the devisee of a copyhold die before the de-
[183] visor; notwithstanding the surrender by the devisor of the copyhold to the use of his will. *Str.* 445.

And so also it is, if the legatee lives as long as the testator, but doth not survive him; for they may both die at one instant, as in a storm at sea they may both be drowned together, or by the falling of a house may both be killed at once: but if the legatee overlive the testator, even though it be but for a moment, the legacy is due, and may be recovered by the executors or administrators of the legatee. *Law of Test.* 231.

M. 6 *An. Snell* and *Dee.* The testator bequeathed by his will in these words; I give 100*l.* a-piece to the two children of *J. S.* at the end of ten years after my decease. The children died within the ten years. And by *Cowper* lord chancellor: This is a lapsed legacy, and shall not go to the executors of the children: For the diversity is, where the bequest is to take effect at a future time, and where the payment is to be made at a future time: Wherever the time is annexed to the legacy itself, and not to the payment of it; if the legatee dies before the time of payment, it is a lapsed legacy in that case. 2 *Salk.* 415.

T. 1721, *Bagwell* and *Dry.* The testator, amongst other things, bequeathed the surplus of his personal estate unto four persons equally to be divided among them, share and share alike; and made A. B. his executor in trust. One of the four residuary legatees died in the life of the testator. After which, the testator died. And the question being, to whom the fourth part devised to the residuary legatee who died in the life of the testator belonged; the lord chancellor, after time taken to consider of it, delivered his opinion, that the testator having devised his *residuum* in fourths, and one of the residuary legatees dying in his lifetime, the devise of that fourth part became void, and was as so much of the testator's estate undisposed of by the will: that it could not go to the surviving legatees, because each of them had but a fourth part devised to him in common, and the death of the fourth residuary legatee could not avail them, as it would have

done had they been all joint tenants; for then the share of the legatee dying in the lifetime of the testator would have gone to the survivors; but here the *residuum* being devised in common, it was the same as if the fourth part had been devised to each of the four, which could not be increased by the death of any of them. This share shall not go to the executor, he being but a [184]
bare executor in trust; and consequently it belongs to the testator's next of kin, according to the statute of distribution; and as to this, the executor is a trustee for such next of kin. 1 *P. Will.* 700.

M. 2 *G.* 2. *Page* and *Page.* A person deviseth to his six relations, all his lands and all his personal estate, in trust to perform his will, and after all these things discharged, directed that the remainder should be equally divided amongst them, share and share alike, and made his six said relations executors. One of the six legatees died, and then the testator died. The question was, whether the share of that legatee who died in the lifetime of the testator should go to the surviving legatees, as part of the *residuum;* or whether in this case it should go to the next of kin of the testator, as so much of his estate undisposed of. It was argued, that where there is a lapsed legacy, it falls into the *residuum* of the personal estate generally; but here a part of the *residuum* itself is a lapsed legacy, and consequently undisposed of, and ought to go to the next of kin of the testator. For the executors are to take nothing as executors, but as residuary legatees. And one of the legatees dying in the lifetime of the testator, his share must go according to the statute of distributions, as undisposed of. And so it was decreed. *Str.* 820.

M. 1705, *Elliot* and *Davenport.* The testator by his will reciting that *B.* owed him 400*l.* gave and bequeathed the same to him, provided that out of it he paid several particular sums in the will mentioned to his wife and children, and the residue he freely and absolutely gave him, and required his executor, immediately on his death, to deliver up the security, and not to meddle with the debt, but to give such release as *B.*, his executors, or administrators, should require. *B.* died in the lifetime of the testator. It was held, that the money directed to be paid to the wife and children was well devised; but as to the residue devised to the debtor himself, it was a lapsed legacy, he dying in the lifetime of the testator; but it was admitted, that if the testator had said, *I forgive such a debt*, or that my executor shall not demand it, or shall release it, that would have been a good discharge of the debt, though the debtor had died in the lifetime of the testator. 2 *Vern.* 521. 1 *P. Will.* 83.

T. 1731, *Willing* and *Baine.* The testator devised by his will 200*l.* a piece to his children, payable at their respective ages [185]
of twenty-one; and if any of them died before twenty-one, then

the legacy given to the person so dying to go to the surviving children. One of the children died in the testator's lifetime. And the question was, whether the legacy should go to the surviving children, or should be a lapsed legacy, and sink into the surplus. By the court: The rule is true, that where the legatee dies in the life of the testator, his legacy lapses, that is, it lapses as to the legatee so dying; but in this case the legacy is well devised over to the surviving children. 3 *P. Will.* 114. (*n*)

Devise of a legacy to a person and his assigns; the legatee

[Residuary clause.]

(*n*) A general residuary clause passes all that is undisposed of, as in case of a lapse. *Brown* v. *Higgs*, 4 *Ves.* 708. [And will carry estates not in testator's contemplation, unless the will contains special indications of a contrary intention. *Morgan* d. *Surman* v. *Surman*, 1 *Taunt. R.* 289.] Therefore a leasehold house, the bequest of which to a charity failed, was held to pass under a general disposition of the residue, and not to belong to the next of kin as undisposed of. *Shanley* v. *Baker*, 4 *Ves.* 732.

Campbell v. *French*. Testator by his will gave legacies to *A.* and *B.*, describing them as grand-children of *C.* and resident in America. By a codicil he revoked these legacies, giving as a reason that the legatees were dead. That fact not being true, they were held intitled on proof of identity. 3 *Ves.* 821.

Hixon v. *Oliver*. Testator devised to his wife "the sum of 300*l.* to be disposed of as she thinks proper, to be paid after his death." It was held to be an absolute interest, and transmissible to her administrator, she having died intestate. 13 *Ves.* 108.

Bradley v. *Westcott*. Testator devised 500*l.* to his wife, according to her appointment by will, and in default thereof to fall into the residue, which was disposed of. It was held that the power of appointment was not executed by such general words in her will as "all my personal estate," &c. and "all my estate and interest therein." 13 *Ves.* 445.

Godfrey v. *Davis*. Testator bequeathed an annuity over, upon the death of the annuitant, to the eldest child of *A.*; and there being no child at his death, it was held that an after-born child was not entitled. 6 *Ves.* 43.

In general where a sum of money, or residue of personalty, is bequeathed to *A.* for life, and then, or if he die without issue, or marry, in whole or in part to *B.*, *B.*'s legacy is considered as a vested remainder, and transmissible if he survive the testator, although he die in the lifetime of *A.* *Pinbury* v. *Elkin*, 1 *Wms.* 563. *Atkinson* v. *Paice*, 1 *Bro.* 91. *Barnes* v. *Allen*, *ib.* 181. *Godwin* v. *Munday*, *ib.* 191. *Monkhouse* v. *Holme*, *ib.* 298. *Att. Gen.* v. *Crispin*, *ib.* 386. *Devisme* v. *Mello*, *ib.* 537. *Dansen* v. *Hawes*, *Amb.* 276. *E. of Salisbury* v. *Lambe*, *ib.* 383. *Benyon* v. *Maddison*, 2 *Bro.* 75. And if such be the construction of the will, the court will secure the fund, and order the produce to be paid accordingly. *Green* v. *Pigot*, 1 *Bro.* 103. *Billings* v. *Sandem*, *ib.* 393. *Nowlan* v. *Nelligan*, *ib.* 489. *Infra*, *Payment of legacies*, 4.

died before it was paid; adjudged, that his administrator shall have it as assignee in law. 1 *Roll's Abr.* 915.

Where the *legacy is conditional, the legacy is not due, until the condition be performed*: And therefore if the legatee die before the condition is performed, the legacy is extinguished; except in some few cases. *Law of Test.* 231. [Conditional legacy.]

If a legacy be given to a child, payable at his age of twenty-one years, and the child dies before he attain that age: though the administrator of the child is entitled to the legacy, yet he shall not have it till such time as the child, if he had lived, would have attained his age of twenty-one years. 2 *Vern.* 199. 1 *P. Will.* 478.

But if a legacy be devised to a child, payable at his age of twenty-one years, and if he dies before that age, then the legacy to go over to another; in this case if the child dies before he attains the age of twenty-one, the second legatee shall have the legacy immediately. 2 *Vern.* 283. 2 *P. Will.* 478. *Viner, Devise*, G. d. 35. (*Laundy* v. *Williams*.)

So if a legacy be given to an infant, to be paid at his age of twenty-one years, and the executors to pay interest for it until it becomes payable: if the infant dies before twenty-one, it is due presently to the executor or administrator of the infant: but if no interest was to be paid for it, then it shall not be paid until such time as the infant would have come to twenty-one in case he had lived; because there it is a benefit the testator intended to the executor by keeping it in his hands; but in the other case it would be none, when interest was payable. 2 *Freem.* 64. [186]

So where the testator bequeathed to an infant 1000*l.* payable at twenty-one; and in the meantime the infant to have the yearly sum of 20*l.*, not amounting to the interest of the legacy given him. The infant died before twenty-one. It was held by *Raymond* chief justice, *Jekyl* master of the rolls, and *Eyre* chief justice, that the executors of the infant should wait for their legacy, till such time as the infant, had he lived, would have been twenty-one; it being unreasonable that the executors of the infant, standing in his place, should be in a better case than the infant himself would have been, had he been living; and it was to be presumed, that the testator had made a computation of his estate, and considered when the same would bear and allow of the payment of this legacy; and that no reason could be given why an uncertain accident should accelerate the payment of this legacy before the time, which was at first intended for that purpose. 2 *P. Will.* 335. [*Chester* v. *Painter*. (*o*)]

(*o*) Joseph Smith gave all his personal estate to his wife upon the following considerations: *inter al.* that at the decease of his said wife, or if she should marry again, 500*l.* be paid to his sister Sarah Smith out of the aforesaid estate, within six months after her decease or

Generally, it is to be considered, whether the time be joined to the *substance* of the legacy, or to the *payment*: If it be joined to the *substance* of the legacy, and the legatee dies before the day, the legacy is gone; as if the testator gives to *B.* 100*l.* when he cometh to the age of twenty-one years, and *B.* dieth before, the legacy will not go to his executors or administrators: But
[187] if the day be joined to the *payment* of the legacy, the executors or administrators of the legatee shall have the legacy, though the legatee die before the day; as if the testator bequeath 100*l.* to *B.*, and wills that it shall be paid to *B.* when he attains the age cf twenty-one years; yet his executors or administrators may recover the legacy when the time is expired that *B.* should have attained that age if he had lived. *Law of Test.* 232, 233.

And this is agreeable to the rule of the civil law, which is, that if a legacy be devised to one generally, to be paid or payable at the age of twenty-one, or any other age; yet this is such an interest vested in the legatee, that his executor or administrator may sue for and recover it; for it is *debitum in præsenti*, though *solvendum in futuro*, the time being annexed to the payment and not to the legacy itself: So if the legacy is made to carry *interest*; though the words *to be paid*, or *payable*, be omitted, it shall be an interest vested. But if a legacy be devised to one *at* twenty-one, or *if* or *when* he shall attain the age of twenty-one, and the legatee dies before he attains that age, the legacy is lapsed. But where the legacy is to arise out of a *real* estate; this, by the better authorities, shall not go to the representative of the legatee, but shall sink in the inheritance for the benefit of the heir, as much as if it was a portion provided by a marriage settlement. But when the legacy is to be paid out of a *personal* estate, the above distinction hath been allowed of; and *Cowper* lord chancellor said, that though it was at first introduced upon very slender reasons, and probably upon no other but from a constant willingness in the civil law to stretch in favour of a particular legatee, against the residuary legatee, who went away with the whole surplus of the personal estate; yet as the chancery hath now a concurrent jurisdiction with the spiritual court in matters of this nature, he thought it highly reasonable that there should be a conformity in their resolutions, that the subject might have the same measure of justice in which court soever he sued. *Law of Test.* 242, 243.

So in the case of *Boycot and others* against *Cotton and others*, Nov. 24. 1738. It was said by the lord chancellor *Hardwicke*,

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marriage. Sarah Smith died, living the wife: and the court of exchequer held that the legacy was not given till after the wife's death or second marriage, and therefore lapsed. *Norris* v. *Huthwaite*, 1 *Bro. C. C.* 182.

that it is now settled, whether the portion charged upon land be given with or without interest, by deed or by will, if the person dies before the age at which it becomes payable, it shall sink into the estate. 1 *Atk.* 555.

M. 1682. *Smith* and *Smith.* The testator devised 100*l.* to his daughter for her portion, chargeable upon a *real* estate, and payable at twenty-one; and the daughter died before twenty- [188] one: the portion shall sink in the land. But it is otherwise, if no time had been limited for the payment of the portion; for in that case it goes to the executor of the daughter. And there is no difference, whether the portion is secured by settlement or by will, if it be to be raised out of a real estate, and the party dies before it is payable; for in either case it sinks in the lands. 2 *Vern.* 92.

H. 1690, *Norfolk* and *Guildford.* The testator by will charged his lands with 6000*l.* for the child his wife was then ensient with, if it proved a daughter; with a clause of entry for non-payment. A daughter is born; who dies. It was decreed, that the 6000*l.* should not be raised for the benefit of her administrator. 2 *Vern.* 208.

M. 1684, *Bartholomew* and *Meredith.* The testator devised lands to be sold for payment of portions to younger children, and one of the children dies after the portion was payable, though before the lands sold. It was held that it being an interest vested, his administrator should have it. 1 *Vern.* 276.

E. 1701, *Jackson* and *Farrand.* The testator by will gave 500*l.* to his daughter, to be paid by his executor at the age of twenty-one out of his personal estate and the rents of his real; and if not raised by that time, the executors to stand seised and take the rents till 500*l.* is raised; and after payment gives the land to his son. The daughter marries at eighteen, and dies under twenty-one, leaving issue a daughter. The husband takes administration. It was held, that the portion should be raised, and that by a sale, though the land would produce little more than the 500*l.* 2 *Vern.* 424. [But this, lord *Hardwike* said, is an anomalous case, and no stress ought to be laid upon it. 1 *Atk.* 556.]

H. 1740, *Lowther* and *Condon.* Thomas Condon, esquire, by his will gave unto his daughter Diana Condon the sum of 1000*l.*, to be raised and paid unto her, immediately after the decease of her mother, out of her mother's jointure lands, with interest of six pounds in the hundred from the death of her mother till the same should be paid. Thomas Condon dies. After which, his daughter Diana intermarries with sir William Lowther, and dies in the lifetime of her mother. Last of all the mother dies. And sir William Lowther, as administrator to his wife, brings his bill for the recovery of the 1000*l.* It was

insisted by the defendant the heir at law, that as the said sum was to be raised and paid out of the lands, and the late lady
[189] Lowther died before the time when this sum became payable, namely, before the death of her mother the testator's widow, the same ought to sink into the estate for the benefit of the heir, and ought not now to be raised. By *Hardwicke* lord chancellor: It is clear, if this were to be paid out of a personal estate, it would have been transmissible to an administrator: It is indeed true, that it hath been an established rule in general, as to real estates, that where a legatee dies before the time of payment of the legacy, it shall sink into the estate; but with regard to portions or fortunes for daughters, the circumstance of the legatee is to be considered; as where a portion is given to one immediately payable when she attaineth the age of twenty-one or marrieth, and such person dieth before either of the contingencies happeneth, it ought to sink, because the legatee wanted no personal provision; but in this case, as lady Lowther was married, and lived married for some years, there is the less reason that it should sink. And it was decreed, that this was an interest vested, and as such transmissible to the administrator, and the legacy should not sink into the estate for the benefit of the heir at law. [But this determination was upon particular circumstances in the will, manifesting an intention that the portion in this event should not sink into the inheritance, but be transmissible; and particularly because the remoteness of the time of payment did not arise from the circumstances of the persons, but of the estate; the legacy being ordered to be paid as soon as the estate should be disincumbered. And upon the same ground, the like was determined afterwards in the case of *Sherman* and *Collins*, Feb. 4. 1745, 2 *Atk.* 127. 130. 3 *Atk.* 319.]

But it is said, if a legacy be chargeable *both* upon the real and personal estate; then so much thereof as the personal estate will extend to pay, shall go to the executors or administrators of the child; for in such case, as far as the executor or administrator claims out of the personal estate, he shall succeed according to the rule of the spiritual court where these things are determinable, although the infant legatee dies before the portion or legacy becomes due: but so far as such legacy is charged upon the land, the court of chancery will not countenance the loading of an heir, merely for the benefit of an administrator. 1 *P. Will.* 276. 601.

[190] But in the case of *Van* and *Clark*, July 1, 1739, lady Craven devised to Godfrey Clark (whom also she made executor and residuary legatee) her messuage and tenement in Lincoln's-Inn-Fields, and all her real and personal estate not otherwise disposed of, to the intent that out of the said real and personal

estates so devised, her several legacies might be paid; amongst which, she gave to Thomas Lewis, to be paid within one year and a half after her decease, 2000*l.* in trust and for the use of his daughter Mary Lewis, to be put out at interest, and the principal and interest to be paid to her at her age of eighteen, or marriage, which should first happen. Thomas Lewis died in the lifetime of the testatrix. Mary Lewis died about half a year after the testatrix, unmarried. The representative of Mary brought his bill to have the 2000*l.* paid to him. The defendant Clark admitted personal assets sufficient, but submitted to the court whether the plaintiff was intitled, and insisted that the house in Lincoln's-Inn-Fields was in the first place charged with this, and that it was not a charge merely on the personal estate, but on the mixed fund of real and personal; and therefore the legatee dying before the day of payment, it ought to sink. By the lord chancellor *Hardwicke:* The infant dying before the time of payment to the trustee, I am of opinion, makes this legacy not raisable for the benefit of the plaintiff her representative. If a legacy is given out of a *personal* estate payable at a certain time; or if given at a certain time, and interest in the meantime; it is a vested legacy. But the rule of this court as to legacies out of *real* estates is otherwise; for if given at a certain time, or payable at a certain time, yet if the legatee die before the time is come, it sinks into the inheritance. So when a legacy is given out of a mixed fund of real and personal estate, at a certain time, or to be paid at a certain time; the construction is the same as if given out of a real estate only. There is but a slight difference between the cases of legacies given at a day, or payable at a day; but the distinction is adhered to, only to give a consentaneous jurisdiction with the ecclesiastical courts; nor is there any case that I know of to warrant a distinction between legacies given out of a *mixed* fund of real and personal estate, and out of real estate only. If the infant had survived the year and half (for the death of the trustee makes no distinction) it would have been extremely clear she would have been intitled to the legacy; and if then she had died before eighteen or marriage, her representatives would have been intitled. But if this had [191]
been merely *personal;* as she died within the year and half, her representative could not have been intitled; for the whole gift is in the direction of the payment; which makes that the substance. In the present case, it is not a legacy merely out of a personal estate, but out of both funds, and the real charged in the first place on the estate in Lincoln's-Inn-Fields. And this construction is more agreeable to the intention of the testatrix, as the sum was intended clearly as a portion for Mary: And the court always goes as far as it possibly can, to hinder the raising

portions out of land for the benefit of representatives. 1 *Atk.* 510. (*p*)

Surplus, [or residue.] 36. The question, how far the executor shall be intitled to the surplus, although he be not by the express words of the will appointed residuary legatee, hath been long litigated, and received a diversity of determinations.

[192] In the case of *Foster* and *Munt*, *M.* 1687, the testator devised particular legacies to his children, and grandchildren, and 10*l.* a piece to his executors for their care; the surplus of the personal estate being 5000*l.* and upwards. The question was, whether the surplus should be a trust for the children, or go to the executors. And it was decreed a trust for the children. For as the legacy to the executors was given for their care, unless such care was to turn to the benefit of others, and not of themselves, the will would be absurd; and therefore it necessarily followed, that the testator designed them only to be trustees for the next of kin. 1 *Vern.* 473. 2 *Vern.* 648. And although no such declaration had been made, yet the legacy being given generally, the law made the same construction, and it was for their care; it being impossible to imagine, that the testator would give a general legacy, if he intended the executor should take the whole. 2 *Abr. Cas. Eq.* 443.

(*p*) This distinction between a portion and other legacy was recognised in *Dawson* v. *Killet*, 1 *Bro. C. C.* 119.; where the testator gave an estate to his wife for life, and if there should be no issue between them, then to Killet, charged with several sums to different legatees. One of these survived the testator, but died before the wife; and lord *Thurlowe* C. held the charge vested and transmissible to his representatives; for " in the case of a portion, the court has construed a sum so given to be so connected with the purpose for which it was given, that it was not intended to be given for any other purpose; so that the purpose failing, the land ought not to be charged." But " this is a devise after the death of the wife to Killet, and the testator charges the estate of Killet (meaning the interest of Killet in the estate) with the sums in question, which distributes the estate between Killet and the legatees. Upon the death of the testator, the remainder vested in Killet; and the moment it vested in Killet, the charges vested in those to whom they were given." See also *Tunstal* v. *Bracken*, 1 *Bro. C. C.* 124. *2d ed.* S. C. *Amb.* 167. *Manning* v. *Herbert*, *ib.* 575. *Jeale* v. *Tickener*, *ib.* 703. And in *Embrey* v. *Martin*, *Amb.* 230., lord *Hardwicke* said of such a legacy, it is a conditional limitation, and there is a legal remedy for raising the money: it is a condition subsequent, as all conditions turned into limitations are: It is to be raised after J. T. (the remainder man) comes into possession. *Note.* A legacy may vest, subject to be devested by a subsequent appointment of a person to whom the testator gives such power, or by the birth of another child, or the legatee's dying under twenty-one, &c. *Earl of Salisbury* v. *Lambe*, *Amb.* 383. *Shepherd* v. *Ingram*, *ib.* 448. *Walcott* v. *Hall*, 2 *Bro. C. C.* 305.

H. 1697, *Earl of Bristol* and *Hungerford.* The testator devised lands to be sold for payment of his debts, and ordered that the surplus should be deemed part of his personal estate and go to his executors, and gave to his executors 100*l.* a piece as a legacy. The question was, whether the executors should have the surplus to their own use, or should distribute according to the statute of distribution. For the executors it was insisted, that the surplus should be part of his personal estate, and go to them, and that he meant it to their own use; and his giving them a legacy of 100*l.* a piece cannot alter the case, for the surplus perhaps might be nothing; and therefore he gave them the 100*l.* that they might at all events be sure of something, and not to exclude them the benefit of the surplus: and this being a devise of the surplus, after debts and legacies paid, cannot be a trust in them, for then all their trust is performed, when debts and legacies are paid. On the other side it was said, that the words in the will, that the surplus should be part of his personal estate and *go to his executors*, were only intended to exclude the heir, who else would have had it, and not to give any greater interest to his executors than they would have had otherwise. And of that opinion was the lord chancellor, who decreed that they were trustees of the surplus for the next of kin. 1 *Abr. Cas. Eq.* 244.

But in the case of *Griffiths* and *Rogers*, *T.* 1704, where a man deviseth his library of books to one, except ten books, such as his wife should choose, and made her executrix: it was decreed, that she should not by this devise be excluded from the benefit of the surplus of the personal estate. 1 *Abr. Cas. Eq.* 245.

In the year 1725, in order to settle this point, the lord chancellor *King* brought a bill into the house of peers, which passed that house, but was thrown out by the commons. The bill was to have settled it for the benefit of the executor. *Str.* 569. [193]

July 15, 1740, *Newstead* and *Johnston.* Grace Lawson by her will gave several legacies to her children, and then directs 1000*l.* to be taken out of her partnership stock in trade, and settled in strict settlement on her son; the residue of her partnership stock she gave to a trustee, with very particular directions as to the management, in trust for the separate use of her daughter Elizabeth Johnston, who was a *feme covert*, and appoints Elizabeth Johnston her executrix, but makes no disposition of the surplus. The bill was brought for an account of this surplus, and that the executrix might be a trustee of the same for the next of kin to the testatrix.——By the lord chancellor *Hardwicke:* The cases in regard to excluding executors from taking the surplus of the personal estate, by reason of the particular legacies before given to them, have been very various, and undergone different

determinations, according to the different circumstances and opinions, and way of reasoning of different persons concerning them; and it is absolutely impossible to reduce all those cases to any certain general rule, without some contrariety between them. But I think the present case a very plain one, that the executrix here should not be excluded from the surplus.—— The law is clear, that where a man makes his will, and an executor; it is a gift in law of all his personal estate to him. So is the rule of the ecclesiastical court. Therefore it is, that where a suit is brought in such a case for a distribution of the *residuum* undisposed of by the will, this court will prohibit them from proceeding in such suit; because they are bound to give the *residuum* to the executor. And this court interposes upon a supposed trust in the executor, of which that court has no cognizance. And I remember some cases, one at the latter end of queen Anne's time, and another since, and another when I sat as chief justice in the king's bench, where such prohibitions have gone. So that the ground upon which executors have been in any cases compelled to distribute the surplus, has been, upon certain circumstances in equity, which have induced a violent presumption, amounting to evidence, that the executor was

[194] intended only a trustee.——The first case was *Foster* and *Munt*; where it was sent to the master to inquire what the surplus amounted to. And I have heard that arose in a great measure from an ill opinion the lord chancellor *Jefferies* had of the executor's behaviour in obtaining that will. And it being reported to amount to 5000*l.* he thought it was absurd to say the testator would have given the executor so small a legacy as 10*l.* for his care and pains, if he had meant at the same time to give him the surplus. But there was no particular evidence of any fraud in the case, but only such a general charge in the bill. So that the decree was founded wholly on that single point.—— From that time, it was taken, where a legacy was given to an executor for his care and trouble, without any disposition of the surplus, that he should be considered as a trustee. And that was founded upon good reason: for such a legacy for care and pains was a plain declaration of the testator's intention, that as to the rest, the executor should not take it to his own use; for it was ridiculous to suppose, that the testator should give him a small legacy for his trouble in managing an estate for himself.—— Afterwards the court went further in the like kind of reasoning, and held, that where a particular legacy was given to the executor generally, without saying for care and pains, even this would exclude him from the surplus, because of the absurdity (as no doubt there would be) in giving him some, and giving him all. From whence the court raised an implication, that since the testator had given him a part, he never intended

him the whole. And this point is now established; though it was at first objected, that the particular legacy might be owing to a doubt of the testator, that the whole personal estate might not prove more than sufficient to pay all the legacies; in which case the executor could have nothing. For which reason the testator might be unwilling to leave him to the chance of the surplus, but would secure something to him by a particular legacy, and then in case of a deficiency he would abate only in proportion. However this point has been now long established, and is not to be controverted by such an argument. And I remember in the case of *Farrington* and *Keetly*, lord *Macclesfield* said, that he had consulted Mr. *Vernon*, who had then left the bar, who told him that he did not then trouble himself with taking notes of modern resolutions upon this point; because he looked upon it to be as plain and settled, as that an estate to a man in fee should descend to a man and his heirs. —— Other cases have [195] been determined in favour of the next of kin, upon the circumstances of the proximity of blood: But these determinations have been overruled in later cases; because that reasoning might produce great uncertainty. For if that distinction were to be admitted, then a distinction would arise as to those of a nearer degree of kindred and those who are more remote; and if the testator's estate was to depend on such circumstances, it would bear a very uncertain construction: though in the case of *Ball* and *Smith*, there was a distinction in favour of a wife. —— I mention these things to lay them out of the case: For the ground of my determination is, that the legacy is given to a *feme covert* of stock in trade, in trust for her separate use, and under very particular circumstances. The intent of the testatrix is manifest. She gives the particular legacy in trust for the wife, who was her daughter; because otherwise it would have passed to the husband as his absolute property; for though upon her death it would have passed from her to the administrator *de bonis non*, yet the husband would have it in point of property and interest, as he would be intitled to it after the debts and legacies were paid out of the assets: Which reason does not extend to the *residuum*; for that it does not appear but she intended the husband should have that as well as her daughter; and no implication can arise upon a will but by a necessary construction; if so, the testatrix had no occasion to make an express devise of that in trust, as she did of the other. — It was said in the argument of this cause, that a particular legacy given in trust for an executor, will have the same effect in point of law, and bar him of the *residuum*, as much as if the legal interest of the legacy were given him. And that is certainly true: because it implies nothing which makes any difference between such a devise in trust, and an absolute one: but, as I said before, here was a

particular reason why this legacy was expressly given in trust, for the husband could not have been otherwise excluded; and it is, that the trustee may enter into partnership with the son; and he is to improve the stock for the separate use and benefit of the wife; which prevents the common implication, that the *residuum* should not pass. Therefore I think there is no ground in this case, to make the executrix account for the surplus; and, as to that, the bill must be dismissed. (q)

[196] June 9, 1745; *Southcot* and *Watson*. General Pulteney by his will gives in the first part of it, to Mrs. Watson, an annuity of 400*l.*; and in the last clause gives her all his household goods and furniture (three pictures excepted), and all his plate, linen, watches, jewels, and cloaths whatsoever, and declared her sole executrix. The bill was brought for an account of such part of the personal estate as is undisposed of, and for a distribution. And by the lord chancellor *Hardwicke:* The bequest of the specific things to Mrs. Watson excludes her from the residue. 3 *Atk.* 226.

Oct. 24, 1750; *Blinkhorn* and *Feast*. The testator gave a pecuniary legacy to *A.* and another of a different value to *B.*, both infants, and made them his executors. The question was, as to the residue of his personal estate, whether it should result to the next of kin, or go to his executors. By the lord chancellor *Hardwicke:* Though the law casts the whole personal estate upon the executor; yet as a will is to be construed chiefly according to the intention of the testator, if it appear manifestly his design that the executor shall not have it, it shall be distributed by this court. As where a specific legacy is given to an executor, he shall not have the residue; as it would be absurd to think, that the testator, after he had given him what he thought convenient, should also intend to give him the whole residue, which would include the particular legacy. Yet in many cases this construction may be improper; and therefore the rule of law has been suffered to take place. As in the case of *Griffith* and *Rogers*, where the executrix had a specific legacy of ten books. And in the case of *Jones* and *Westcomb* (Prec. Ch. 316.) where a man, possessed of a long term, devised it to his wife for life, and after her death to the child she was then ensient with, and made her executrix. For in this case it was necessary to devise the term to her specifically, for the sake of the limitation to the child. In the present case, not to mention that it is improbable the testator would have made these persons who are infants his executors, merely for the purpose of distributing his personal estate, without any benefit to themselves; it was very proper he should give them these legacies, though he might intend they should after

(q) S. C. 2 *Atk.* 46.

have the residue; for they do not take the legacies, as they will the residue; for this they are intitled to jointly and equally, and the survivor will take the whole. But the legacies are unequal in value, and their interest in them different and separate. And [197] it cannot be inferred that the residue includes the particular legacies; for as they are bequeathed, the legatees are intitled to them in severalty, and with different interests; whereas if he had not separated them, they would have devolved jointly, and otherwise than he intended they should. And he decreed the residue to the executors.

Finally; in the case of *Lawson* and *Lawson*, Apr. 19, 1777, upon an appeal from the chancery to the house of lords, it was determined, that unless in cases where the contrary is inconsistent and incompatible with the apparent intention of the testator, or there is violent presumption of fraud, the residue of the personal estate, after payment of debts and legacies, shall go to the executor. (*r*)

(*r*) 7 *Bro. P. C.* 511. In this case, the wife was executrix, and had property specifically given to her, which was hers before marriage. And the authority was cited in *Martin* v. *Rebow*, 1 *Bro. C. C.* 154. to prove that a wife having a *specific legacy* bequeathed to her, might take the residue, although any other executor having a *pecuniary legacy* could not. But *per* lord *Thurlowe*, C.: The case of a wife may make a circumstance in evidence, but it cannot make a rule of law. The rule (of *Foster* and *Munt*) is laid down, and has been acted upon for years past, that where a testator gives the executor a legacy, he pays him for his trouble, and turns him, as to the residue, into a trustee. And here the wife, who was executrix, having a real estate bequeathed to her, with a house in town, plate, &c., but no pecuniary legacy, an account was decreed to be taken of the residue, to be distributed according to the statute.

In *White* v. *Evans*, one executor being by a legacy for his care clearly a trustee of the residue for the next of kin, the other was held to be a trustee also. 4 *Ves.* 21. And in *Urquhart* v. *King*, where no legacies were given to the executors, they were under the circumstances held to be trustees of the residue for the next of kin. 7 *Ves.* 225. But executors are *primâ facie* intitled to the residue undisposed of: and it requires *strong* and *violent* though not *irresistible* presumption to make them trustees. *Pratt* v. *Sladden*, 14 *Ves.* 193. [199. 200. 18 *Ves.* 247. *S. C.*]

[The result of the many cases on this subject appears to be this; by law, the appointment of an executor vests in him all the personal estate of the testator, and if any part (after payment of the funeral expenses and debts) remains undisposed of by the will, it vests with the executor beneficially; but wherever courts of equity have seen on the face of the will sufficient to convince them that the testator did not intend the executor to take the surplus, they have turned the executors into trustees for those on whom the law would cast the surplus in case of a complete intestacy, *i. e.* the next of kin; as where

[37. The making of a will is but the inception of it, and it doth not take effect till the death of the testator: for *omne testamentum morte consummatum est; et voluntas est ambulatoria usque ad extremum vitæ terminum.* Then shall it be against the nature of a will to be so absolute that he who maketh the same being of good and perfect memory cannot countermand it. (2)

If a man make his testament and last will irrevocably, yet he may revoke it, for his acts or his words cannot alter the judgment of the law to make that irrevocable which of its own nature is revocable. (3)

To constitute a revocation the *animus revocandi* must be as strong as the *animus testandi* in the original act, and no unguarded expressions without the former can have operation. (4)]

Wills how revocable.

By the statute of 29 *C.* 2. *c.* 3. No devise in writing, of lands, tenements, or hereditaments, or any clause thereof, shall be revocable, otherwise than *by some other will or codicil in writing, or other writing declaring the same,* or *by burning, cancelling, tearing, or obliterating the same by the testator himself, or in his presence and by his directions and consent;* but all devises and bequests of lands and tenements shall remain and continue in force, until the same be burnt, cancelled, torn, or obliterated by the testator or by his directions in manner aforesaid, or unless the same be altered by some other will or codicil in writing, or *other writing of the devisor, signed in the presence of three or four witnesses* declaring the same. § 6.

And no will in writing concerning any goods or chattels or personal estate shall be repealed, nor shall any clause, devise, or bequest therein be altered or changed, by any words, or will by word of mouth only, except the same be in the life of the testator committed to writing, and after the writing thereof read unto the
[198] testator, and allowed by him, and proved to be so done by three witnesses at the least. § 22. (5)

No will of lands shall be revocable otherwise than by some other will or codicil in writing, or other writing declaring the same.] Apr. 30, 1754. *Ex parte Hellier.* The question before sir George Lee, as judge of the prerogative court, was, Whether the execution of a second will is a revocation of the first, though the

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the executors are called executors in trust, or where any other expressions occur shewing the office only to be intended them, and not the beneficial interest. See *Bridgman's Digest,* tit. *Executors,* &c. VIII.]

(2) *Forse* and *Hembling's* case, 4 *Rep.* 61. 4 *Burr. Rep.* 2512.

(3) *Vinyor's* case, 8 *Rep.* 81., and see *Swinburne,* 504, &c.

(4) *Smith* v. *Collins, E. Term* 1788, *cor.* Dr. Calvert, MSS. *Cas.* 176.

(5) Before this act, revocation of a written will might be by parol, or by the very intention of testator to alter any thing in his will, although the first will was not cancelled or defaced. *Trevilian's* case, *Dy.* 143. *Dyer,* 310. b. *pl.* 81.

second is afterwards cancelled; and whether such cancelling sets up the first will again? He gave sentence that it was a revocation, and that the cancelling the second did not set up the first. 3 *Atk.* 798. (6)

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(6) S. P. *Moore* v. *De la Tone*, 1 *Phil. R.* 375. 406. *Hooton* and *Dickens* v. *Head*, 3 *Phil. R.* 26. But *quære*, is not some act or declaration necessary in case of a subsisting will, to shew it to have been the testator's intention that it should not revive by cancelling a second? *Passey* v. *Hemming*, *Prerog.* 1808. *Deleg.* 1812. 1 *Phil. R.* 428. 438, 9.

The *factum* of a second will is a presumptive revocation of a first: and throws the burden of proof on the adverse party, to repel the presumption by circumstances. Thus when a first will *A.* was substantially copied by a later will *B.*, *A.* was in point of fact destroyed when *B.* was completed, and in order to give *A.* effect again, there must have been some act of republication, or some revival by necessary implication, or some satisfactory proof of the intention of the deceased that it should revive. See *Inst. lib.* 2. *tit.* 17. § 2. and § 7. *Dig. lib.* 28. *tit.* 3. § 2. *lib.* 37. *tit.* 11. *c.* 11. *Stacey* v. *Dickens*, *Vanier* v. *Hue*, *Passey* v. *Hemming* cited 1 *Phil. R.* 410. 414, 415. Cases at common law, *viz. Glazier's* case, 4 *Burr. R.* 2512. *Wright* v. *Netherwood*, 2 *Salk. R.* by *Evans.* 593. *notis.* *Harwood* v. *Goodright*, *Cowp.* 87. are *contra.* Again in *Stride* v. *Cooper*, 1 *Phil. R.* 334. it was said that where two wills of different dates are perfect, the *animus revocandi* necessary to revive the first and revoke the latter must be very clearly established, and proved either by an act of republication, or by very unequivocal circumstances. Taking a middle course, it has been held, that where the subsequent will has no clause of revocation, and is not contradictory to the former, they may both stand. *Hitchins* v. *Basset*, 3 *Mod. R.* 204. 2 *Bla. R.* 937. 7 *Bro. P. C.* 344.

Thus, where a testator had duly executed a will to pass real estate, but appeared afterwards to have made some interlineations, immaterial as to the disposition of the real estate, and a fair copy unexecuted was found in the same drawer; Held that the latter circumstance being demonstrative only of a future intention not carried into effect, it was inoperative; and that the whole facts of the case, shewing that revocation was not his object, such alterations did not revoke the will. *Winsor* v. *Pratt*, 2 *Brod. & Bing. R.* 650.

Interlineations are inoperative without a republication, and obliterations not striking out the whole devise, do not amount to a revocation; but while they avoid the obliterated parts, yet leave the will good *pro tanto.* *Sutton* v. *Sutton*, 2 *Cowp.* 812.; and see *Scruby and Finch* v. *Fordham and others*, 1 *Add. Rep.* 78. S. P.

But where a former codicil was found uncancelled, and a subsequent one contained no words of revocation, but the intention to revoke was clearly proved; Held that the latter was intended as a substitute, and not an independent codicil. In a court of probate, the whole question is one of intention, and is completely open to investigation. *Methuen* v. *Methuen*, 2 *Phil. R.* 416.

If a will is before the court, the validity of which is admitted, the court will pronounce for it in preference to an alleged subsequent

M. 1689; *Eggleston* v. *Speke* or *Petit.* Lady *Speke* by will gave her lands to one and his heirs. Afterwards she made another will, by which also she gave her lands to the same man and his heirs; but this last will was held void to pass lands, because the witnesses did not subscribe it in her presence. It was objected that this was good however as a revocation of the former will. But by the court; It cannot operate as a revocation, because contrary to her apparent intent. To revoke by a *will*, within the words of the statute, must be by a will attested by three witnesses, and subscribed by them in the presence of the testatrix, which this will was not. *Carth.* 81. (7)

H. 1716; *Onyons* v. *Tyrer.* A man makes his will duly executed and attested, and at the same time in like manner executes a duplicate thereof. Some time after, having a mind to change one of his trustees, he orders his will to be written over again, without any variation whatsoever from the first, save only in the name of that trustee. And when it was so written over, he executes it in the presence of three witnesses, and the three witnesses subscribed their names, but not in his presence. After this, the testator cancels the duplicate, by tearing off the seal; and then dies. The question was, whether this second will, not being good as a will to pass lands, should yet be a revocation of the first; and if it should not, whether the cancelling the other should be a revocation thereof within this statute? And it was decreed, that neither the making the second, nor the cancelling of the first was a revocation thereof, though in the second there was an express clause that he did thereby revoke all former and other wills: wherein the lord chancellor took this distinction, that the second was not intended barely a revocation of the first, so as to signify his intention of dying intestate; but it was intended as an effectual will to pass the lands to the persons, and in the manner
[199] thereby devised; and therefore if it was not good as a will to that purpose, it was no revocation of the first. 1 *Abr. Eq. Cas.* 408. (8)

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will of the genuineness of which it has serious doubts. *Saph* v. *Atkinson and another*, 1 *Add. Rep.* 162.

In *Phipps* v. *Anglesea*, 7 *Bro. P. C.* 443. Two inconsistent wills of the same date, neither of which could be proved to have been last executed, were held in *Dom. Proc.* void for uncertainty, and would let in the heir, if no act of testator subsequent to the wills explained them so as to reconcile what would otherwise appear inconsistent.

(7) 3 *Mod.* 258. 1 *Show*, 89. *Comb.* 156. *Holt.* 222. S. C.

(8) For a clause of revocation standing alone is good, but not as included in a will, if that will is not good. *Carthew*, 79. *Duke of Somerset* v. *Jacobs*, 1712. *Deleg. MSS. Cas.* 177. 1 *P. Wms.* 343. 2 *Vern. R.* 741, *Pre. Ch.* 459. *Gilb. R.* 130. and see *Winsor* v. *Pratt*, *supra, note* 6. A distinct and separte *declaration of revocation* must be signed in the presence of the witnesses. *Hilton* v. *King*, 3 *Lev. R.* 86.

E. 1754. *Ellis* and *Smith.* A man makes a will, and by it revokes a former will. The only proof of the execution of this latter will was, by three witnesses, who did not see him sign or seal it; but upon their being called in, he acknowledged it to be his hand-writing and seal, pointing with his finger to the will; upon which they attested it. Two questions arose: 1. Whether considering this as an original will, it was well executed. 2. If it is, whether it is well executed as a revocation, because by the statute it ought for this purpose to be *signed in presence of the witnesses.* By the lord chancellor *Hardwicke:* As to the former question, if this had been *res integra,* it would have been a matter of doubt with me; but it is *res adjudicata,* and must now be taken as decisive. All the cases where an attestation by three witnesses at different times is held good, are authorities in point; for they must all be founded upon the proof of this very fact, the acknowledgment of the testator that it was his hand-writing. It could not be a different execution before each witness, for then there would be three executions, and the act would not be complied with, as it requires three witnesses to one execution: and as to the *sealing* — putting any thing on the seal, as a finger, *animo signandi,* is good enough. But he seemed to think that sealing was not *signing* within the statute, contrary to the *obiter* opinion in *Lemain* and *Stanley.* (3 *Lev.* 1.)——As to the second, he said, that the words *signed in the presence of three witnesses* refer to the next preceding words [*other writing*] only, and not to a will or codicil; and so it was determined (3 *Mod.* 218.) in the case of *Hoyle* and *Clarke.*

H. 10. *G.* 3. *Glazier* v. *Glazier.* This cause had been tried at the assizes, and a verdict given for the plaintiff the heir at law, against the defendant who was devisee in two wills. It now came before the court, upon a motion on the part of the defendant, for a new trial. Which was opposed by the counsel for the plaintiff, who argued that both bills were revoked: and consequently, their client took as heir at law. The question turned upon the revocation of the first will, by making the second. The first will was not cancelled. The second was cancelled by the testator himself. Both wills were in the testator's custody at the time of his death. The counsel for the plaintiff, the heir at law, argued, that the second will was a complete instrument [200]
at the time when it was executed. That it clearly proved the testator's intention of revoking the former. And that the execution of it was as much a revocation of the former, as if he had thrown the former into the fire. That the preservation of it was merely accidental, and of no consequence. That it had been already totally extinguished, so that it could never revive. That as it had never been republished, it remained a mere nullity; and that no subsequent event could hinder the execution

of the second will from operating as a revocation of the former. The second will was therefore the testator's only subsisting will, so long as it remained uncancelled. And when he thought fit to cancel and destroy it, it is manifest that he meant to die intestate, and that his heir at law should take. If a woman makes a will, and then marries, her prior will is thereby revoked; and shall remain so, although she should immediately become a widow. They cited a case of *Ashburnham* and *Bradshaw*; and also the case *ex parte Hellier*, 3 *Atkyns*, 798., where sir *George Lee* gave sentence, that the execution of a second will is a revocation of a first, though the second be afterwards cancelled: and that the cancelling the second did not set up the first; which they said, was the same point, only that it was personal property: And this sentence was affirmed by the delegates. They denied the two cases of *Eggleston* and *Speke*, and of *Onyons* and *Tyrer*, to be like the present case. The former is only, that a second will shall not revoke the first, if the second is not good in law, but void. The latter is, that a second will, devising lands to the same person and revoking all former wills, and this second will subscribed by three persons but not in the testator's presence, shall not revoke the former will, so as to let in the heir at law. ——— The counsel on the other side, beginning to speak, were stopped by lord *Mansfield*, who said the case was so plain, as to render it unnecessary to proceed. He observed, with regard to the case *ex parte Hellier*, that Mr. *Atkyns* only reports what passed in chancery. There might be other circumstances appearing to the ecclesiastical court, which might amount to a revocation of a will of personal estate. Here, the testator has by both wills devised the lands in question to the defendant. His cancelling the second is a declaration, that he doth not intend that to stand as his will. Doth not that speak, that his first will shall stand? If he had intended to revoke the first will when he made the second, it must have operated as a de-
[201] claration that the defendant should not take. But that could not be his intention; because he devises to the defendant by both. A will is ambulatory till the death of the testator. If the testator lets it stand till he dies, it is his will. If he does not suffer it to do so, it is not his will. Here, he had two. He has cancelled the second: It has no effect, no operation: it is as no will at all, being cancelled before his death. But the former, which was never cancelled, stands as his will. 4 *Burr. R.* 2512.

In the case of *Rolfe* and *Harwood*, *H.* 14 *G.* 3. In the common pleas. The jury found that John Lacy esquire, had made two wills, one in 1748, and the other in 1756, and *that the disposition made in the latter was different from that in the former, but in what particulars the jurors did not know*; and they further added, that they do not find that the testator cancelled, or that

the defendant (the devisee under the former will) destroyed the latter will, but what is become thereof they are ignorant. *De Grey* chief justice, *Gould* and *Nares* justices, were of opinion, that this was a sufficient revocation of the former will, to let in the title of the heir at law; it being proved to be the last will of the testator, and containing a different disposition from the former will, although in what particulars it did not appear. *Blackstone* justice was of opinion, that this was not a sufficient revocation, because it did not specifically appear, that the latter revoked the former: and nothing shall be presumed on a special verdict: It is setting up a second will in the dark, which neither the court nor jury ever saw, and of the contents whereof they are wholly ignorant. Upon this, a writ of error was brought in the king's bench; and there the court unanimously reversed the judgment of the common pleas. Afterwards, a writ of error being brought in parliament, the house of lords, upon hearing the opinion of the barons of the exchequer in favour of the judgment of the court of king's bench, affirmed the judgment of that court, that this was not a sufficient revocation. 3 *Wils. R.* 497. *Black. Rep.* 937.

[*Or by burning, cancelling, tearing, or obliterating the same by the testator himself, or in his presence, and by his directions and consent*: and herein First *of burning, tearing, and cancelling.*] *M.* 16 *G.* 3. *Mole* and *Thomas.* William Palin having several times declared himself discontented with his will, being one day in bed near the fire, ordered Mary Wilson, who attended him, to fetch his will, which she did, and delivered it to him; it being then whole, only somewhat creased. He opened it, looked at it, then gave it something of a rip with his hands, and so tore it as almost to tear a bit off; then rumpled it together, and threw it [202] on the fire: but it fell off. However it must soon have been burned, had not Mary Wilson taken it up, and put it in her pocket. Palin did not see her take it up, but seemed to have some suspicion of it, as he asked her what she was about, to which she made little or no answer. He at several times afterwards said, That was not, and should not be his will, and bade her destroy it. She said at first, So I will, when you have made another. But afterwards, upon his repeated inquiries, she told him she had destroyed it, though in fact it was never destroyed. She asked him, when his will was burned, whom his estate would go to. He answered, to his sister and her children. He afterwards writ to his brother John Mills, telling him he had destroyed his will, and would make no other till he had seen him, and desired him to come; for (says he) if I die intestate it will cause uneasiness. However he died without making any other will. The jury thought this a sufficient revocation, and gave a verdict for the heir at law. It was moved for a new trial. But the

court were of opinion that this was a sufficient revocation; and said, that a revocation under the statute may be effected, either by framing a new will amounting to a revocation of the former, or by some act done to the instrument itself, as burning, tearing, cancelling, or obliteration, by the testator, or in his presence, and by his direction; any of these, joined with a declared intent, is a sufficient revocation within the statute. *Black. Rep.* 1043. (9)

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(9) The act of cancellation or destruction is *primâ facie* done *animo cancellandi*, and is a presumptive intention to revoke till the contrary is shewn. This is the legal presumption; but, like all other such presumptions, may be repelled by evidence. *Rickards* v. *Mumford and another*, 2 *Phil. R.* 23.; for, in order to explain any act of cancelling, tearing, defacing, &c. parol evidence must be let in, *per* lord *Mansfield* in *Burtenshaw* v. *Gilbert*, *Cowp. R.* 49. 52. 87.; see also *Bibb* v. *Thomas*, 2 *Bla. R.* 1043.: for the act of *cancelling* is an equivocal act, and in order to make it a revocation, it must be shewn *quo animo* the will was cancelled; for a complete defacing or destruction of the instrument, made by mistake or accident, can be no revocation of the will. See the above cases, and *Onyons* v. *Tyrer*, 2 *Vern.* 743. 1 *P. Wms.* 345. *Pre. Ch.* 459. Thus, where an instrument was proved to have once existed as a finished will, but to have been cancelled under an erroneous impression that the testatrix had no power to make it: at the same time, that she adhered to it throughout in mind and intention, notwithstanding such cancellation. *Thynne* (lord *James*) v. *Stanhope*, 1 *Add. R.* 52.

Again: The presumption which operates against every cancelled paper may be rebutted, by shewing that it was not cancelled by the testator, or by his order, or at the time of his death, but that the cancellation was subsequent to his death, and the paper will be admitted to probate. *Sylva* v. *De Feria*, *M. T.* 1789, *cor.* Sir *W. Wynne*, MSS. *Cas.* 124. So in *Trevelyan* v. *Trevelyan*, 1 *Phil. R.* 149. a will of personalty destroyed in the lifetime of the testator, but without his knowledge, was admitted to proof as contained in the deposition of the witness.

In short, questions of revocation are mere questions of intention; and all which rests with the court in respect of them, is to put a rational construction on the act of revocation. If a testator tears off or effaces his seal and signature at the end of a will, the court will infer an intention to revoke the whole will; this being the ordinary mode of performing that operation. If he on the other hand obliterates a particular clause; this on the same principle operates only as a revocation *pro tanto*, or of that particular clause: and so if part of a sheet be torn off or cut through. *Scruby and Finch* v. *Fordham and others*, 1 *Add. Rep.* 78. So in the civil law, *D.* 28. 4. 3. *Mantica de Conj. ult. Vol.* 1. xii. *tit.* 1. No. 31. By the civil law, if the testator mutilated a will himself, the heir could not claim under it; but if it could be shewn that another had mutilated it, the will was good. *Dig. lib.* 28. *tit.* 4. *c.* 3. Therefore, when an instrument which from circumstances (*Voet. ad. Pand. lib.* 28. *tit.* 4.) appears to have been so mutilated by the testator, the court must put some

Even a latter will, though in other respects void, yet may be a sufficient revocation of the former. As where there was a

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construction on the act, and it will be insufficient to say that the testator had done it in sport or to while away a vacant half-hour — if he did it with whatever motive advisedly, the law will fasten on him the conclusion that he did it, *animo cancellandi*. 1 *Phill. Rep.* 407, 408. Mutilation of a will by the testator has been held to amount to cancellation, and that cancellation not to revive a prior will of nearly similar import. *Moore* and *Metcalf* v. *De la Torre* v. *Moore*, 1 *Phil. Rep.* 375. So held before the delegates, *Moore* v. *Moore* and *Metcalf*, *Id.* 406. Where the testator being moved with a sudden impulse of passion against one of the devisees under his will, conceived the intention of cancelling it and of accomplishing that object by tearing, and after he had partly done so, but before he had completed his purpose, was diverted therefrom by the interference of a byestander, and proceeded no further in its destruction, but expressed himself satisfied "that it was no worse;" and the jury found that the act of cancelling was incomplete at the time the testator was stopped; the court held that they had drawn a right conclusion from the evidence. For to effect a revocation within 29 *Car.* 2. the act of cancelling by tearing, &c. must be *complete;* and refused to disturb the verdict. *Doe* v. *Perkes*, 3 *B. & A. Rep.* 489. If there are two parts of a will, one part of which testator keeps himself, and deposits the other with some other person, and then voluntarily cancels or destroys the part in his own custody, it is a revocation of both. This is a legal presumption: but like all other legal presumptions, may be repelled by evidence. *Rickards* v. *Mumford and another*, 2 *Phil. Rep.* 23.

Revocation by *obliterating the will by the testator himself or in his presence and by his direction and consent.* If a testator obliterates a particular clause, this being a question of intention, it is held to operate as a revocation, *pro tanto* or of that particular clause. *Scruby and another* v. *Fordham and others*, 1 *Add. Rep.* 78. *Sutton* v. *Sutton*, *Cowp.* 812. Where one devised lands to two trustees in trust for certain purposes by a will duly executed and attested, and afterwards struck out the name of *one* of those trustees, and inserted the names of two others, leaving the general purposes of the trust unaltered, though varying in certain particulars, and did not re-publish his will: Held that as this intent appeared to be only to revoke by substituting another good devise to other trustees, which new devise could not take effect for want of the proper requisites of the statute of frauds, so it should not operate as a revocation: or at most it could only operate as a revocation *pro tanto* as to the trustee whose name was obliterated, leaving the devise good as to the old trustee, whose name was retained. *Short* d. *Gastrell* v. *Smith*, 4 *East*, *R.* 419. In *Larkins* v. *Larkins*, 3 *B. & P.* 16. 109. it was held, that if a testator having executed a devise of lands in the presence of three witnesses, to two persons as joint tenants in fee, afterwards strikes out the name of one of the devisees, and there is no re-publication, the erasure only operates as the revocation of the will *pro tanto*.

devise of lands to one, and afterwards the devisor by a will duly executed and attested, devised the lands to another who was a papist: it was decreed, that both the devises were void: for though the latter was void as a will, yet it was good as a revocation. 2 *Abr. Eq. Cas.* 771. (*s*)

But a will which will pass personal estate, is not a sufficient revocation of a former will whereby a real estate is devised. *Comyns*, 451.

[203] And although the statute says, that no will in writing concerning personal estates shall be repealed by word of mouth only, except the words be put into writing, and read to and allowed by the testator, and proved to be so done by three witnesses; yet where a man by will in writing devised the residue of his personal estate to his wife, and she dying, he afterwards by a nuncupative codicil bequeathed to another all that he had given to his wife, this was resolved to be good: for by the death of the wife, the devise of the residue was totally void; and the codicil was no alteration of the former will, but a new will for the residue. 1 *Abr. Cas. Eq.* 403.

[Implied revocation of a will.] Also, the statute hath not taken away revocations of wills by *act of law*; as if the testator afterwards make a feoffment, or do any other act inconsistent with the will: but such revocation remains as before the statute. *Carth.* 81. (*t*)

If a man devises lands to one and his heirs, and afterwards *mortgages* the same lands to another for years or in fee; though a mortgage in fee is a total revocation at law, yet in equity it shall be a revocation *pro tanto* only. 1 *Abr. Eq. Cas.* 410. [*Baxter* v. *Dyer*, 5 *Ves.* 656. S. P.]

And the reason is, because a mortgage is not considered as a conveyance of the estate, but only as a charge upon it; being merely a security, and in the consideration of equity carries only

(*s*) So a deed intended to operate as an appointment to uses, but not sufficient for that purpose, was held to revoke a will, the party appearing to have had that intention. *Shove* v. *Pincke*, 5 *T. Rep.* 124. and 310. [See *ante*, 198. *note* 1.]

(*t*) [And this though the feoffment is void for want of livery and seisin. *Moor.* 429. 1 *Rol. Ab.* 614—616.] So if a testator suffer a recovery of, or sell the lands devised. *Marwood* v. *Turner*, 1 *P. Wms.* 165. *Arnold* v. *Arnold*, 1 *Bro. C. C.* 401. [*Doe* d. *Lushington* v. *Bp. Landaff*, 2 *New. Rep.* 491. S. P. and the same of an equitable estate, *Freeman* v. *Freeman*, *cor. lord Hardwicke*, C. 1 *Wils.* 308. Or, if he levy a fine, 3 *Moore*, 24. *Parker* d. *Biscoe* v. *Dilnot*, 2 *N. R.* 401. A contract for sale revokes a devise, *Knollys* v. *Alcock*, 5 *Ves.* 654. A deed intended to operate as an appointment of uses, but not sufficient for that purpose, may have the effect of revoking a will, if the party appear to have had that intention. *Shove* v. *Pincke*, 5 *T. Rep.* 124. 310.]

a chattel interest; the creditor gains nothing real, it affords no dower, and goes to executors. *Sparrow* and *Hardcastle*, May 6, 1754. 3 *Atk.* 798.

But if lands be devised to one in fee, and afterwards mortgaged to the same devisee; this is a revocation *in toto*, being inconsistent with the devise: but if the mortgage had been to a stranger, it had been a revocation *quoad* the mortgage only. *Prec. Cha.* 514.

If a man seised in fee, devises it to one in fee or for life, and afterwards makes a *lease* to another for years; this, even at law, shall not be a revocation but during the years. 1 *Roll's Abr.* 616.

So if a husband possessed for forty years, devises it to his wife, and after leases the land to another for twenty years, and dies; this lease is not any revocation of the whole estate, but only during the twenty years, and the wife shall have the residue by the devise. *Id.* [204]

But where a man seised of a lease for lives, devised it, and afterwards surrendered the whole lease, and took a new one to him and his heirs for three lives; it was decreed, that this renewal of the lease was a revocation of the will as to this particular. For by the surrender of the old lease, the testator had put all out of him, had divested himself of the whole interest; so that there being nothing left for the devise to work upon, the will must fall, and the new purchase, being of a freehold descendible, could not pass by a will made before such purchase. 3 *P. Will.* 166. 170. [*Marwood* v. *Turner*.]

June 10, 1743. Sir *Thomas Abney* and *Miller*. The testator by his will devised all his college leases which he then held of Magdalen college to Mrs. Burton, his mother, to be sold by her immediately after his decease, and ordered the money arising by such sale to be distributed according to the directions of the said will. Some years after making the will, he surrendered the college leases devised by it, and accepted two new leases of the premises, but one of them was not sealed with the college seal, till after the death of the testator. Lord *Hardwicke* decreed, that the lease actually renewed after the will made, was a revocation of the devise (*u*), but otherwise as to the lease not perfected for want of the college seal. 2 *Atk.* 593.

But where the testator devised *all and singular his leasehold estate*, and afterwards renewed a lease; it was held by lord *Hardwicke* clearly, that this leasehold estate passed by the will: for that this is not a specific legacy, but only an enumeration of the several particulars of the personal estate, but yet is a general devise of the whole. 3 *Atk.* 199.

Though a covenant or *articles* do not at law revoke a will; yet if entered into for a valuable consideration, amounting in equity to

(*u*) [And the rule of revocation of wills is the same at equity as at law. *S. P. Hone* v. *Medcraft*, 1 *Bro. C. C.* 160.]

a conveyance, they must consequently be an equitable revocation of a will, or of any writing in nature thereof. 2 *P. Will.* 624.

[A devise of a real estate is not revoked by bankruptcy.] (1)

A woman's *marriage* is alone a revocation of her will. *Id.*

[205] [4 *Rep.* 60. *b. Forse* v. *Hembling.*]

A man made a will, and appointed one (who was no relation) to be his executor. He afterwards went abroad, where he became a governor of one of the plantations, and sent over for an English woman of his acquaintance, whom he married, and had children by; and died, without an actual revocation of his will. Yet it was determined, that this *total alteration of his circumstances* was an implied revocation. 1 *P. Will.* 304. *Eyre* and *Eyre.*

So in the case of *Lugg* and *Lugg*, *M.* 8 *W.* before the delegates. One being single made his will, and devised all his personal estate. Afterwards he married, and had several children, and died without other will or disposition. It was ruled, that there being such an alteration in his estate and circumstances so different at the time of his death from what they were when he made the will, here was room and presumptive evidence to believe a revocation, and that the testator continued not of the same mind. 2 *Salk.* 592. *L. Raym.* 441.

And in the case of *Brown* and *Thompson*, *T.* 1702. The lord keeper was of opinion, that alteration of circumstances may be a revocation of a will of *lands*, as well as of a personal estate; notwithstanding the statute, which doth not extend to an implied revocation. 1 *Abr. Cas. Eq.* 413. (2)

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(1) *Charman* v. *Charman*, 14 *Ves.* 580.

(2) And accordingly, marriage and the birth of a child has been adjudged a revocation of a will of *lands*, in *Christopher* v. *Christopher*, [*Dougl.* 35.] 4 *Burr.* 2171. 2182. and *Sprange* [or *Spragg*] v. *Stone*, *Amb.* 721. [2 *Eden. Rep.* 263. and *note.*] though the child were born after the father's death. *Doe* v. *Lancashire*, 5 *T. Rep.* 49. But it seems that marriage *or* the subsequent birth of a child alone, are not of themselves sufficient to support the presumption of a revocation. See *Dr. Hay's Judgment*, *Hil.* 1770, in *Shepherd* v. *Shepherd*, 5 *T. Rep.* 49. 51. *n.* (which doctrine however Mr. *Fonblanque* has combated in his note to *Treat. on Eq.* ii. 355.) [J. B. married and *afterwards* made his will, and devised to his niece, and died, leaving his wife *enceinte* with a daughter, which was unknown to him. This *birth* was held not a revocation of the will. *Doe* d. *White* v. *Barford* 4 *M. & S.* 10.] And as marriage and the birth of a child, when taken together, only furnish ground on which to presume an alteration of the testator's mind, such implied revocation may be rebutted by evidence, either written or parol, which proves a republication. *Brady* v. *Cubitt*, 1 *Doug. Rep.* 31. [*Quære,* whether such implied revocations may be rebutted by evidence of parol declarations of the testator made after the events, that he meant his will to stand. *Kembel* v. *Scrafton*, 2 *East*, *Rep.* 530.]

Wills of Seamen and Marines.

[Repeal of several acts.]

By 55 *G.* 3. *c.* 60. Intituled, "*An act to repeal several acts "relating to the execution of letters of attorney, and wills of petty "officers, seamen, and marines, in his majesty's navy; and to make "new provisions respecting the same.*" 9 & 10 *W.* 3. *c.* 41. § 3. 6. 20 *G.* 2. *c.* 24. § 6. 31 *G.* 2. *c.* 10. § 21. 24. 9 *G.* 3. *c.* 30. § 5. 6. 26 *G.* 3. *c.* 63. 32 *G.* 3. c. 34. and *c.* 67. § 14. 16. 49 *G.* 3. *c.* 108. § 1. 6. 10. 17. 54 *G.* 3. *c.* 93. § 7. are repealed. § 1.

Mode of executing wills.

By § 2. No will *made* by any petty officer or seamen, non-commissioned officer of marines, or marine, before his entry into his majesty's service, shall be rated to pass or bequeath any wages, pay, prize or bounty money, or other allowances of money to accrue due for or in respect of the service of any such petty officer or seamen, non-commissioned officer of marines, or marine, in his majesty's navy. Nor shall any will *made or to be made* by any such petty officer, &c. in the king's service, be *valid* to bequeath any such wages, &c. due, or to grow due, to him, unless it shall contain the name of the ship to which the person executing the same belonged at the time, or to which he last belonged,

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Ex parte the Earl of Ilchester. A second marriage, and the birth of children, the wife and children being provided for by settlement, and there being children by the former marriage; held to be a case of exception from the rule, that marriage and the birth of a child revoke a will. 7 *Ves.* 348. But where there was no settlement on the second wife and her issue, a second marriage and the birth of a child were held presumptive revocation of a will, made by a widower, and in favour of children of a former marriage. *Hollway* v. *Clarke,* 1 *Phill. Rep.* 339. *Emerson* v. *Boville, id.* 342.; nor does the death of the child of the second marriage after the presumption. *Id.* The whole law of presumed revocation of former will by marriage and birth of children is stated by sir John Nichol, in *Johnston* v. *Johnston,* 1 *Phil. Rep.* 447. in which case the first will of a married man with children was set aside on shewing the birth of more children, and his intention to make another will.]

[Mutual or similar wills.]

Hinckley v. *Simmons.* Two unmarried sisters made *similar* wills, in favour of each other, bearing the same date, and appointing the same executors. The marriage of one of them was held not to revoke the will of the other. 4 *Ves.* 160. [And see *Lowfield* v. *Stonehams,* 2 *Stra.* 1261. Mutual or conjoint wills irrevocable by either of the supposed testators are unknown to the *testamentary* law of this country; and a separate will of the same deceased of a *later* date was in effect pronounced for in *Hobson* v. *Blackburn and another,* 1 *Add. Rep.* 274.: but the devisees of such a will may be trustees for performing the deceased's part of the compact. *Dufour* v. *Perraro,* per lord *Camden,* 18 July, 1769, 2 *Hargr. Jurid. Exer.* 101. *Walpole* v. *Cholmondeley,* 7 *T. Rep.* 138. observed on 3 *Ves.* 403.]

and also in every case a full description of the relationship or residence of the person or persons to whom, or in whose favour as executor or executors, the same shall be granted or made; and also the day of the month, and year, and the name of the place when and where the same shall have been executed. Nor shall any such will be good for the purposes aforesaid unless executed and attested as follows: — *In case* any such will is made by any such petty officer or seaman, non-commissioned officer of marines, or marine, at any time while they respectively belong to and are on board any of his majesty's ships, as part of the complement thereof, or be borne on the books as a supernumerary, or as an invalid, or for victuals only, unless such will is executed in the presence of and attested by the captain or other commanding officer of the ship, or during his absence on leave on separate service, by the commanding officer for the time being, who in that case shall state at the foot of such attestation the absence of such captain, &c. at the time of the execution of such will, and the occasion thereof; or in case of the inability of such captain or commanding officer by reason of wounds or sickness to attest any such will, then unless such will is executed in the presence of and attested by the first lieutenant or other officer next in command of such ship, who shall state at the foot of such attestation the inability of such captain, &c. to attest the same: — *In case* any such will shall be made by any such petty officer, &c. in any of his majesty's hospitals, or on board any of his majesty's hospital ships, or in any military or merchant hospital, or at any sick quarters, either at home or abroad, unless such will shall be executed in the presence of and attested by the governor, physician, surgeon, assistant surgeon, agent, or chaplain, of any such hospital or sick quarters of his majesty; or by the commanding officer, agent, physician, surgeon, assistant surgeon, or chaplain for the time being, of any such hospital ship; or by the physician, surgeon, assistant surgeon, agent, chaplain, or chief officer of such military or merchant hospital, or other sick quarters, or one of them: — *In case* any such will shall be made by any such petty officer, &c. on board of any ship in the transport service or in any merchant ship, unless the same is executed in the presence of and attested by some commission or warrant officer, or chaplain in his majesty's navy; or some commission officer, or chaplain belonging to his majesty's land forces, or royal marines; or the governor, physician, surgeon, assistant surgeon, or agent of any hospital in his majesty's naval or military service who may happen to be then on board of such transport or merchant vessel, or by the master or first mate thereof, or one of them: — *In case* any such will shall be made by any such petty officer, &c. after his discharge from his majesty's service, unless the same (if the party making such will resides in London or Westminster, or within

the bills), shall be executed in the presence of and attested by the inspector (for the time being) of seamen's wills, or his assistant, or clerk; or unless the same (if the party resides at or within seven miles from any port or place where the wages of seamen in his majesty's service are paid), shall be executed in the presence of and attested by one of the clerks in the office of the treasurer of the navy, resident at such port or place; or unless the same (if the party resides at any other place in Great Britain, Ireland, or in Guernsey, Jersey, Alderney, Sark, or Man), shall be executed in the presence of and attested by a justice of peace, or by the minister, or officiating minister or curate of the parish or place in which such letter of attorney or will shall be executed; or unless the same (if the party reside in any other part of his majesty's dominions, or any colonies, &c. or foreign possession or dependency of his majesty, his heirs or successors, or any settlement within the charter of the East India Company), shall be executed in the presence of and attested by some commission, or warrant-officer, or chaplain of his majesty's navy, or commission officer of royal marines, or the commissioner of the navy, or naval storekeeper at one of his majesty's naval yards, or a minister of the church of England or Scotland, or a magistrate or principal officer residing in any such island, colony, &c. or if the party resides at any place not within his majesty's dominions, or within any place last above enumerated, unless the same shall be executed in the presence of and attested by the British consul, or vice-consul, or some officer having a public appointment, or commission, civil, naval, or military, under his majesty's government, or by a magistrate or notary public of or near the place where such letter of attorney or will shall be executed. *Ib.*

[Wills executed in foreign prisons when valid.]

55 G. 3. c. 60. § 3. Enacts that every will already or hereafter made by any petty officer or seaman, non-commissioned officer of marines, or marine, at any time while they were or shall be prisoners of war in parts beyond the seas, shall be as valid as if the same had been respectively executed and attested in the manner required by the acts recited in § 1. or any of them. Provided every such will shall have been executed in the presence of and attested by some commission or warrant-officer of his majesty's navy, commission officer of royal marines, physician, surgeon, assistant surgeon, agent, or chaplain to some naval hospital; or some commission officer, physician, surgeon, assistant surgeon, or chaplain of the army, or any notary public, any thing in any of the said acts to the contrary notwithstanding: but so as not to invalidate or disturb any payment already made under any letter of administration, certificates or otherwise, pursuant to the said printed acts, or any of them, in consequence of the rejection of any

such wills by the inspector of seamen's wills, for want of due attestation according to the directions of the said acts, or any of them.

[Wills not in same instrument with power of attorney.] By § 4. No will of any seaman contained in the same instrument, paper, or parchment, with a letter of attorney, shall be available in law for any purpose whatever.

[Entering wills on muster-books.] By § 5. All commanders of ships shall, on their monthly muster-books or returns, specify which of the persons mentioned therein have made any will during that month, or other space of time from the preceding return, by inserting the date thereof opposite the party's name under the head of "WILL."

[Examination of wills by inspector.] § 6. Enacts, That before any such will as in this act mentioned, shall be attempted to be acted on or put in force, the same shall be sent to the treasurer of the navy, at the Navy Pay-office, London, in order that the same may be examined by the inspector of seamens' wills; who, or his assistants, shall immediately on receipt of every such will, duly register the same in a numerical and alphabetical manner, in separate books, to be kept for that purpose, specifying the date of such will, the place where executed, and the name and addition of the executor or executors; and also the names and additions of the attesting witnesses: and shall mark the said wills with numbers corresponding with those made on the entries thereof in the said books: and shall take all proper means to ascertain the authenticity of every such will, and in case it appears to him, or he has reason to suspect that any such will is not authentic, he shall forthwith give notice in writing to the executor or executors that the same is stopped, and the reason thereof, and shall also report the same to the treasurer or paymaster of the navy, and shall enter his caveat against such will, which shall prevent any money from being received thereon, till the same shall be authenticated, to the satisfaction of the said treasurer or paymaster; but if, on such examination, it appears to the said treasurer, paymaster, or inspector that such will is authentic, the said inspector or his assistant shall sign his name to it, and also put a stamp thereon, in token of his approbation thereof.

[Probate of wills by executors.] By § 8. Where any petty officer or seaman, non-commissioned officer of marines, or marine, who shall have belonged to any ship of H. M., his heirs or successors has died or shall hereafter die, having left a will appointing any executor or executors therein, no pay, wages, prize, bounty, or other allowance of money which may have been due to such testator at the time of his death, shall be paid over to, or recovered by such executor, except on the probate of such will, to be obtained as follows; viz. After such will has been so transmitted, registered, inspected, and approved as hereinbefore directed, the inspector of seamen's wills shall issue to the person named and described as executor or executrix of such will, a check in lieu thereof, containing directions to return

the same, on the testator's death, to the treasurer or paymaster of his majesty's navy, which check shall be in the words and figures, or to the purport and effect following:

'No.

'CHECK.

'Navy Pay Office,

'18 ,

'IT being directed by act of parliament, 55 Geo. III. 'cap. that wills granted by petty officers and seamen, 'non-commissioned officers of marines and marines, belonging 'to his majesty's navy, shall be lodged in this office for the 'purposes therein specified; and that a check shall be issued 'for every such will, mentioning the particular heads thereof, 'which by virtue of the said act shall stand in the place of the 'same: this is therefore issued to shew the receipt at this 'office, of a will dated at [*or*, on board of] upon 'the day of made and executed 'by *A. B.* now or formerly of his majesty's ship 'in favour of *C. D.* and appointing *E. F.* executor [*or*, execu-'trix] and which is attested by *G. H.* and *J. K.* The said *E. F.* 'upon the testator's death, is entitled, upon production of this 'check, to demand of this office, that the said will may be 'directed and sent to a proctor in *Doctors Commons* to obtain a 'probate thereof, which probate is also to be lodged in this 'office; I

'

'

'now apply for a certificate, to enable me to obtain probate of 'the above mentioned will, being the executor [*or*, executrix] 'therein named.—My place of abode is at

'(Signed) *E. F.*

'WE hereby certify, that we personally know the above 'subscribing *E. F.* the present holder of this check, who 'is an inhabitant of this parish; and that we believe him '[*or*, her] to be the person described as executor [*or*, 'executrix] therein.

'*L. M.*
'*N. O.*
'both housekeepers of the parish
'of in the county
'of

'I hereby certify, that I have examined the above-named '*E. F.* the executor [*or*, executrix] and also the above-'named *L. M.* and *N. O.* (inhabitant householders in this 'parish) as to their knowledge of the said *E. F.* and of his

'[*or*, her] being the executor [*or*, executrix] of the will 'of the above-named *A. B.* as he [*or*, she] represents him-'self [*or*, herself] to be; and that I am satisfied with their 'answers, and have seen the said *E. F.* sign the said 'petition or application, and the said *L. M.* and *N. O.* sign 'the said certificate in my presence.

'The said *E. F.* the executor [*or*, executrix] is
'feet inches high, complexion,
'eyes, hair, age,
'particular marks.

'At
'this day of } *P. Q.* Minister.

'N. B. If the testator shall die after he leaves the naval 'service, a certificate of his burial, or some other au-'thentic proof of his death, must likewise be sent to this 'office.

'If the executor [*or*, executrix] knows any proctor in *Doctors* '*Commons*, he [*or*, she] is desired to mention his name, that 'he may be employed in obtaining the probate.

'The above application and certificates are to be filled 'up and signed upon the testator's death, and the check 'to be sent by the general post, under cover directed to 'the treasurer, *or*, to the paymaster of his majesty's navy, '*London*.'

[Duty of minister, &c. as to signing check.]

And in the event of testator's death, the minister, officiating minister, or curate of the parish in which the said executor, &c. may then reside, shall, on being applied to for his signature to the certificate at foot of the said check, examine such executor, &c., and such two inhabitant householders of the parish as may be disposed to sign the first certificate on the said check, touching the claim of the said executor, &c., and being satisfied of his or her being the person described as such in the said check, the said executor, &c., shall subscribe the application subjoined to the said check, (the blank therein being first filled up agreeably to the truth,) in the presence of the said minister, &c., and the said two inhabitant householders shall also subscribe the said first certificate on the said check (the blanks being first filled up agreeably to the truth) in the like presence; for which respective purposes the said executor, &c., and householders shall attend when and where the said minister, &c. shall appoint: and the latter shall sign the second certificate on the said check (the blanks therein, and in the description thereunto subjoined, being first filled up agreeably to the truth:) and the said executor, &c. shall, before examination or signing the said application, pay two shillings and sixpence to the said minister for his trouble on the occasion: and the said application and certificates having

been completed according to the directions therein and hereby given, shall be transmitted by the said minister, &c. by the general post, addressed to the treasurer or paymaster of the navy, London: and the said original will having been passed or stamped as directed by this act, the inspector of seamen's wills, or his assistant, shall note thereon the amount of the wages due to the deceased, as calculated on the search sent to the inspector from the navy office, and shall forward such will to a proctor in Doctors Commons, in order to his obtaining probate thereof: and in case the executor or executrix shall not reside within the bills of mortality, the said inspector shall also forward to such proctor, a letter addressed to the said minister in the form or to the effect following.

' No.

' Navy Pay Office,

' Reverend Sir, 18 .

' I am directed by act of parliament, 55 Geo. III. chap. ' to forward to you the inclosed [commission, *or* requisition] ' for the purpose of swearing *E. F.* therein named as executor ' [*or*, executrix] of the will of *A. B.* late a seaman [*or*, marine] ' in his majesty's navy, deceased, which [commission, *or* re- ' quisition] when executed, you will be pleased to return, ' addressed as follows: ' To the treasurer [*or*, to the pay- ' master] of his majesty's navy, *London*,' specifying and ' describing the receiver general of the land tax, the collector ' of the customs, or of the excise, or clerk of the cheque, ' whose abode is nearest to the executor [*or*, executrix] and ' who will be directed to pay him [*or* her] the wages due to ' the deceased.

' The copy of the will may be delivered to the executor [*or*, ' executrix.]

' I am, reverend sir,
' Your most obedient servant,
' *J. P.* Inspector.'

' To *P. Q.* minister of the parish
' of in the
' county of .'

[Duty of proctor in obtaining probate.]

And such proctor having received the said will, and the said letter so written by the inspector (in case such letter shall be necessary,) shall immediately sue out the previous commission or requisition, or take such other legal steps as may be necessary to enable the executor, &c. to obtain probate: and shall inclose in the said letter, such previous commission or requisition, or other legal or necessary instrument, with instructions for executing the same; and also a copy of the said will and the said letter, and its inclosures shall be forwarded to the said minister, by the general

post, agreeably to the address put thereon by the inspector of seamen's wills as aforesaid.

[Duty of ministers receiving commissions, &c.]

§ 9. Enacts, That such minister shall immediately on receipt of such previous commission or requisition or other instrument, take such steps as to him may seem proper or necessary, for procuring the execution of such previous commission, &c. directed by the proctor employed in Doctors Commons to be executed, and shall transmit the same, when so executed, to the treasurer or paymaster of the navy, London; and if the person applying for such probate of will shall be and reside at a distance from the place where wages, prize-money, or other allowances of money due to the deceased are payable, he shall specify the receiver general of land-tax, collector of the customs or excise, or clerk of the cheque, who may be most convenient or nearest to the person applying for such probate: and the said treasurer, paymaster, or inspector, shall immediately on receipt thereof, send the said executed instrument to the aforesaid proctor, who, in pursuance thereof, shall forthwith sue out and procure such probate.

[Administration, how obtained in order to payment of wages of intestates.]

By § 10. When any petty officer or seaman, non-commissioned officer of marines, or marine, who shall have belonged to any ship of his majesty, his heirs or successors, has died, or hereafter shall die intestate, leaving any wages, pay, prize or bounty money, or other allowances of money of any kind, due to him in respect of services in his majesty's navy, the same shall not be paid unto any representative, but on letters of administration to be obtained as follows, viz: — The person or persons claiming such administration, shall send or give in a note or letter to the said inspector, stating his or her place of abode, and the parish in which the same is situate, the name of the deceased, the name of the ship or ships to which he belonged, and that he or she has been informed of his death, and requesting the inspector to give such directions as may enable him or her to procure letters of administration to the deceased, or to the like effect, on receipt whereof the said inspector shall send by course of post, under cover, to the minister, officiating minister, or curate of the parish or wherever the claimant shall reside, a petition in the words and figures following, or to the like effect.

'No.

'LIST.

'1st degree - widow.
'2d — - - child.
'3d — - - father.
'4th — - - mother.
'5th — - - brother *or* sister.
'6th — - - grandfather, *or* grandmother.

'Sir,

'Having obtained information that *A. B.* born about the year at and belonging to his majesty's ship about the

'7th — - - uncle, aunt, nephew *or* niece.
'8th — - - cousin german.
'9th — - - cousin german once removed.
'10th — - - second cousin.

year died at in the month of one thousand eight hundred and without leaving any will, to the best of my knowledge and belief, I now apply for a certificate to enable me to obtain letters
'of administration to his effects, being his lawful
'and sole [*or* one of his] nearest of kin: no one to the best of
'my knowledge and belief of a nearer degree being living at the
'time of the death of the said deceased, who died a bachelor [*or*
'widower.] — My place of abode is

'*C. D.*

'We hereby certify, that we personally know the above sub-
'scribing *C. D.* and believe what he [*or* she] has stated to be
'true.

'*E. F.*
'*G. H.*
'both inhabitant householders
'of the parish of
'in the county of

'I hereby certify, that I have examined the above-named *C. D.*
'who claims administration to *A. B.* late a
'belonging to his majesty's ship and also
'the above-named *E. F.* and *G. H.* (inhabitant householders
'of this parish) as to their knowledge of the said *C. D.* and
'of his [*or* her] right to administer to the effects of the said
'*A. B.* and that I am satisfied with their answers, and have
'seen the said *C. D.* sign the above application or petition,
'and also seen the said *E. F.* and *G. H.* sign the above cer-
'tificate.
'The said *C. D.* is feet inches high,
' complexion, eyes, hair,
'age, particular marks.
'At this
'day of 18

P. Q.
Minister.'

'N. B. If the person applying is the widow of the party
'deceased, she must forward an extract from the parish
'register, or some other authentic proof of her marriage.'
'If the deceased died after he had left the naval service, an
'extract from the parish register of his burial, or some
'other authentic proof of his death, must likewise be sent
'to this office.'
'If the person applying knows any proctor in *Doctors*
'*Commons*, she [*or he*] is desired to mention his name,

'that he may be employed in obtaining the letters of
'administration.'

'This application when filled up and attested, is to be
'sent by the general post, under cover, directed to the
'treasurer, *or* to the paymaster of his majesty's navy,
'*London.*'

And the inspector shall, at the same time, send to such minister a letter, acquainting him with the nature of the claim and the steps to be taken thereon, in pursuance of the directions hereinafter in that behalf contained: and also send to the claimant a letter advising him or her of the forwarding of the said petition or paper, under cover, to such minister, and directing him to take such steps as are hereinafter inserted, for substantiating his claim to the satisfaction of the inspector: and on receipt of the said petition or paper, and letter, the minister shall, on being applied to for his signature to the said paper, examine the claimant, and also such two inhabitant householders of the parish as may be disposed to sign the first certificate on the said paper, touching the right of such claimant to the administration arising to the degree of relationship stated in such petition; and being satisfied of such right, the person claiming such administration, shall fill up the several blanks in the first part of the said paper, as the truth may be, and subscribe the same in the presence of the said minister: and the two householders shall subscribe the first certificate on the said paper (the blanks therein being first filled up agreeably to the truth) in the like presence: for which respective purposes the said claimant and householders shall attend when and where the minister shall appoint: and the minister shall sign the second certificate on the aforesaid paper, (the blanks therein, and in the description thereunto subjoined, being first filled up agreeably to the truth) and the said claimant shall, before examination or signing the said petition, pay to the said minister two shillings and sixpence for his trouble; and the said paper being completed, shall be returned by the said minister, by the general post, addressed to the treasurer or paymaster of the navy, London, who on receiving the same, shall direct the inspector of seamen's wills to examine the same, and make such enquiry relative thereto, as may seem to him necessary in that behalf; and being satisfied, shall forthwith make out a certificate in the words and figures following, or to the like effect.

'By act of parliament, 55 Geo. III. Chap.

'No.

'Certificate to obtain letters of administration.

'Navy Pay Office,

18

'HAVING duly examined an application made to this office

'by *C. D.* of in the county of stating 'that she [*or* he] is the of *A. B.* originally 'of and late a seaman [*or* marine] belonging 'to his majesty's ship who died intestate a widower '[*or*, bachelor] on the day of 18 , 'and without leaving any one of a nearer degree of kindred to 'him; and it appearing that no will of the deceased has been 'lodged in this office, I therefore grant this abstract of the said 'application, and certify, that I believe what is therein stated to 'be true; and also that the said *C. D.* may obtain letters of ad-'ministration to the effects of the said *A. B.* deceased, which 'effects appear not to exceed the sum of provided 'always, that she [*or*, he] is otherwise entitled thereto by law.

'*J. P.* Inspector.

'To

'Proctor in *Doctors Commons.*'

'N. B. The previous commission or requisition (if such 'should be necessary) is to be addressed agreeably to the super-'scription of the within cover, in which the same is to be 'enclosed, and forwarded by the proctor; and when such com-'mission or requisition shall be returned to this office, it will be 'forwarded to him, and he is then to sue out letters of adminis-'tration, and send them to the inspector, with his charge noted 'thereon.'

And after filling up the blanks in the said certificate, as the case may require, the said inspector shall sign and address the same to a proctor in Doctors Commons: and in case the person claiming administration shall not reside within the bills of mortality, shall inclose and send with such certificate, a letter addressed to the minister and church-wardens, or elders of the parish within which such person shall then reside, signifying the transmission of such commission or requisition, for the purpose of swearing the claimant as administrator or administratrix as aforesaid: provided to the best of the said minister's belief, he or she answers the description contained in the same; and instructing him to return the commission or requisition when executed, under cover, addressed to the treasurer or paymaster of the navy, London; and to specify and describe the receiver-general of the land-tax, collector of the customs or excise, or clerk of the cheque, whose abode is nearest to the person applying for such administration, and who will be directed to pay him or her the wages due to the deceased; and the proctor to whom such certificate shall be addressed and sent, shall immediately on receipt of the same, sue out the previous commission or requisition if necessary, or take such other steps as may be proper towards enabling the person so applying for letters of administra-

tion to obtain the same; and shall enclose such previous commission, &c., or other legal and necessary instrument, with instructions for executing the same, in the letter so to be addressed to such minister, by the said inspector as last aforesaid, and shall forward such letters and enclosures by the general post, agreeably to the address put thereon by the treasurer or paymaster of the navy, or the said inspector.

[Minister's duty on rejecting the petition.]

Provided that if the minister shall reject the said petition or paper for want of proof to his satisfaction of the claimant being the person entitled to administration of the deceased's effects, he shall state his reasons for such rejection on such petition, and forthwith return it addressed to the treasurer or paymaster of the Navy as aforesaid: and in case no application is made to him by the claimant, or no effectual steps taken by the claimant so as to complete the said petition, and the certificates thereon within two calendar months from the date of the Inspector's letter accompanying it, the minister shall at the expiration of that time forthwith return the said petition or paper addressed as above, with his reason for doing so noted thereon. § 11.

[Minister's duty on receiving commission.]

§ 12. Enacts that such minister shall immediately on receipt of such letter as aforesaid, with the previous commission or requisition, or other instrument inclosed therein, take such steps as to him may seem fit to procure the execution thereof, and being so executed shall transmit it to the treasurer or paymaster of the Navy, London: and if the person applying for such administration shall be at a distance from the place where the money due to the deceased is payable, he shall specify the receiver-general of land-tax, collector of customs or excise, or clerk of the cheque, who may be most convenient, to such person applying for administration: and the said treasurer or paymaster shall immediately on receipt thereof send the said previous commission, &c. so executed as aforesaid to the proctor employed in Doctors Commons, who shall forthwith sue out letters of administration to the estate of the intestate, in favour of the applicant.

[Treasurer, as paymaster of navy, shall direct inspector to issue check.]

By § 13. As soon as any letters of administration, or probates of wills or letters of administration, with will annexed, have been obtained and passed the seal of the proper court in the manner hereinbefore directed, in the different events hereinbefore specified, the proctor who has sued out the same, shall immediately send the same addressed to the treasurer or paymaster of the Navy, together with the copy of the will, and an account of his charges in obtaining the same: which shall not exceed the sums hereinafter allowed: and the said treasurer on receipt thereof, shall direct the inspector of seamen's wills to issue *a check containing the heads* of such letters of administration or probate of will, or letters of administration with will annexed, as the case may be, and

the latter shall note thereon the amount of the said proctor's expences, provided they be at the rates hereinafter allowed, and shall likewise specify on the said check; the revenue officer or clerk of checque residing as aforesaid, nearest to the administrator or executor so to be named in such check, if such communication has been made to him: which check of letters of administration, or of letters of administration with will annexed so prepared shall be delivered over by him to the said administrator; and which check of probate of will shall be delivered over by him to the said executor, together with the copy of the will so transmitted to him by the proctor, the said copy being first stamped by the inspector, if the said administrator or executor shall be present, or demand it in person, but if not present, then the inspector shall deliver such check and such copy of will to the deputy paymaster, which check shall be as follows, or to the like effect.

'No.

'CHECK.

'Navy Pay Office,
Day of

'IT being directed by act of parliament, fifty-fifth *George* 'third, chap. that letters of administration 'and probates of wills, granted to the representatives of petty 'officers and seamen, non-commissioned officers of marines, 'and marines, belonging to his majesty's Navy, shall be lodged 'in this office, as vouchers to the treasurer for payments made 'thereon, and that a check shall be issued for every such ad-'ministration and probate of will, and administration with will 'annexed, specifying the particular heads thereof, which, by 'virtue of the said act, shall stand in place of the same; this is 'therefore issued, to shew the receipt at this office of [letters of 'administration, probate of will, letters of administration with 'will annexed] granted to *C. D.* of in 'the county of as [administrat execut 'Administrat with will annexed] of *A. B.* late of his ma-'jesty's ship Dated the 'day of

'No.

'Remittance bill, to be addressed to at

'The aforesaid [letters of administration, probate of will, 'letters of administration with will annexed] were sued out 'by proctor in *Doctors Commons*, whose charges amount 'to *J. P.* Inspector.'

'To the deputy paymaster of the Navy.'

By § 14. If any proctor, registrar, or other ecclesiastical officer, shall deliver any letters of administration, probate of will, or [Proctor not to deliver letters

[Penalty on agents granting letters of administration but to treasurer or paymaster of navy.]

letters of administration with will annexed, to any other person than the treasurer or paymaster of the navy, or the said inspector, as directed by this act, he shall forfeit for every such offence, 100*l.* to the use of Greenwich Hospital; and if any prize agent shall pay any prize money due to a deceased petty officer or seaman, non-commissioned officer of marines, or marine under any other authority than the check directed by this act, to be issued by the inspector, the payment shall be void: and the agent shall forfeit for such offence a sum equal to such prize money, to the use of Greenwich Hospital: to be recovered with costs, either in the name of the governors, or of the treasurer of the navy, without essoin, &c. or more than one imparlance allowed.

[Expence of suing out probate or letters of administration.]

By § 15. No ecclesiastical court or registrar thereof, or any proctor or other person soever shall, under any pretence, take and receive more for serving out probates or letters of administration, in order to receive wages, pay, prize or bounty money, or other money due to such petty officers, &c. at his death, or for his services in his majesty's navy, than the several sums in *Schedule* (B): Provided that if at any time hereafter any increase or diminution takes place in the stamp duties on such instruments, then the charges shall be increased or diminished to the extent of such alteration or diminution, but no further, or otherwise.

[Penalties on proctors taking more than allowed, and on magistrates, &c. aiding them.]

By § 16. Any officer, proctor, or other persons, who shall presume to take any more than the sums in the different events specified in *Schedule* (B.) for the charges of probates, &c. shall forfeit to the party grieved 50*l.*; to be recovered with costs in any court of record: or if any registrar or other officer of any ecclesiastical court shall knowingly be aiding in procuring probate or letters of administration, for the purpose of enabling any person to receive the wages, pay, prize money, or allowance of money due, or becoming due, for the services of any petty officer or seaman, non-commissioned officer of marines, or marine, on board any of his majesty's ships, otherwise than is prescribed by this act, every such proctor, registrar, or other officer, shall for ever after be incapable of acting in any capacity, in any ecclesiastical court in G. B., and shall forfeit 500*l.* recoverable in any court of record at Westminster, in moieties to the king and informer.

[Extra reasonable charges allowed to proctors.]

By § 17. Whenever any extraordinary trouble or expence shall attend the suing out letters of administration, or letters of administration with the will annexed, to the widow or next of kin, or probates of wills to the executors of any such petty officer or seaman, non-commissioned officer of marines, or marine, the proctor who has sued out the same may make an addition to his bill in proportion to the said extraordinary trouble and expence, which, if reasonable, shall be allowed and passed by the inspector; but if it appear to him unreasonable, he shall refer it to the treasurer or paymaster of the navy, who, in case he disapproves of such

bill, shall cause it to be returned to Doctors Commons, to be checked and taxed by a registrar or deputy registrar, who shall do so without fee: unless the said expences have arisen in consequence of any *litigation* respecting obtaining such letters of administration, &c., in which case he may take a fee of 3*s*. 4*d*.

By § 18. Where any sum not exceeding 20*l*. shall be due for the services of any petty officer or seaman, non-commissioned officer of marines, or marine deceased, in order that the widow, next of kin, or executor, may not be put to great expence, the inspector of seamen's wills, after having taken the previous steps to ascertain the justness of their respective claims to letters of administration, probate, &c. as hereinbefore directed in cases of granting certificates to Doctors Commons for letters of administration, &c. shall issue a certificate as follows: [Sums not exceeding 20*l*. paid on certificate.]

'Act of Parliament, 55 G. III.

'No.

'CERTIFICATE.

'Navy Pay Office, Day of

'HAVING duly examined a claim presented to me as inspec-
'tor of seamen's wills, &c. by *A. B.* of in the county
'of stating that he [*or* she] is the of *C. D.*
'originally of and lately a seaman, [*or* marine]
'belonging to his majesty's ship and who died at
' on the . I therefore hereby certify, that I
'believe the contents as therein stated to be true; and also, that
'the said *A. B.* is entitled to receive whatever wages, prize money,
'and other allowances of money, may be due to the said de-
'ceased, provided the amount thereof does not exceed the sum
'of twenty pounds.

'Remittance bill to be addressed to
'at

J. P. Inspector.

'To the deputy paymaster of the navy, [who shall take care to
'note hereon all sums which he shall pay, or cause to be paid,
'upon the authority of the same.]'

which certificate so prepared shall be delivered over by him to the said widow, &c. if she, he, or they shall be present: but if not, then the inspector shall specify thereon the revenue officer residing nearest to such widow, &c. and shall deliver such certificate to the deputy paymaster § 18.

By 59 *G*. 3. *c*. 59. where any sum not above 20*l*. is due for the services of any petty officer, &c., who being born a bastard, shall have died, or shall die intestate, in order that the person entitled to the effects or part thereof, by grant from the crown, may not be put to great expence, the inspector of seamen's wills, on inspection of such grant, may issue a certificate in the form provided [Intestate bastard.]

by 55 G. 3. c. 60. § 18. in case of any sum not exceeding 20*l.* due for the services of any petty officer, &c. deceased: and all the clauses, powers, and penalties of that act, are extended to cases arising under this act.

[Creditors of seamen administering shall deliver to inspector account of names and abodes.]

"For preventing frauds frequently practised on the representatives of deceased petty officers and seamen, non-commissioned officers of marines, and marines, by persons falsely pretending to be creditors of the deceased," it is enacted by 53 G. 3. c. 60. § 19. that no letters of administration shall be granted to any person as a creditor of any deceased petty officer, &c. in order to enable him to receive the wages, pay, prize or bounty money, or other money of any kind due to the deceased for his services in his majesty's navy; but every person claiming to be such creditor shall be entitled to receive from the treasurer, or paymaster of the navy, the agent for prizes, or the treasurer of Greenwich Hospital, as from any person other than the executor or administrator of the deceased, the amount of his claim out of such wages, &c. as may be due to him at his decease, or as far as such wages, &c. will extend for that purpose on the following approval of the amount of his claim: *i. e.* Every such person or persons so claiming to be creditors shall deliver to the inspector an account in writing, signed with his, her, or their names, stating the particulars of demand, and specifying his, &c. place of abode, verified by oath (or if quakers by affirmation) in writing of such person or persons, or one of them, taken before such justice of peace: on the receipt of which said account the inspector shall with all speed cause an advertisement to be inserted once in three London Newspapers, also three times in the public newspaper published at the nearest place to the usual residence (if known) of the next of kin, or to the place of birth of such deceased, in case such residence or place shall not appear to be within the bills, signifying that a creditor or creditors of the deceased have applied to the treasurer of the navy for a *Certificate* to obtain payment of the demand, and thereupon, if the next of kin or executor of the deceased shall within six calendar months from date of such advertisement, petition the treasurer or paymaster of the navy for a certificate to enable him to obtain letters of administration, or probate of the will of any such deceased, the said inspector shall cause notice in writing to be given to such next of kin, &c. of the names and abodes of the persons so claiming to be creditors of the deceased, and the amount of their debts claimed; and shall also cause notice in writing to be given to such creditors of the abode of such next of kin or executors: who may petition for a certificate to obtain such administration or prove such will for twelve calendar months from the date of such advertisement; but in case of neglect to do so for the above time, then the said inspector or person authorized to do so by

the treasurer or paymaster shall proceed to investigate the account of such creditors, for which purpose he may require production of documents, &c. relating to such demand: and in case they produce the same, or being unable to do so shall give some satisfactory reason for not doing so, and shall otherwise satisfy the said inspector, &c. of the justice of the demand in part or in the whole, the said demand shall be allowed in part or in all as seems fit: but if such accounts, &c. are not produced, or a sufficient reason assigned for not doing so, or if such inspector, &c. is not satisfied of the justice of such demand, the same shall be disallowed. Provided that the party dissatisfied with such decision may appeal to the treasurer or paymaster, who shall examine the parties and their witnesses on oath (or affirmation if quakers) or otherwise to receive proof thereof by like oath, &c. taken before some justice of peace, and may allow or disallow the claim in all or in part as seems fit: which said decision shall be final. Perjury and subornation thereof in the oaths above required shall be punished as such.

[Creditors how paid if no will proved or administration granted.]

By § 20. If within twelve calendar months from date of the said advertisement, no probate of the will or letters of administration to the effects of any such petty officer, or seamen, non-commissioned officer of marines, or marine, shall have been applied for by the next of kin or executors, the creditors shall be entitled to receive the full amount of their debts allowed as above, so far as the wages, &c. due for the naval services of the deceased will extend to satisfy the same; and thereupon the said inspector or his assistant shall grant to such creditors a certificate, signed by him in the form set forth in *Schedule* (A.); and the deputy paymaster shall note on every such certificate the exact amount of the wages due for the services of the deceased in every ship of his majesty's, in which he shall have served; and on the granting of such certificate so much of the wages due for the services of such deceased as shall be sufficient to satisfy the amount of the sum admitted as above to be due to such creditors, shall be paid and remitted to them in the manner herein, and by any other law in force provided for payment of the like wages to executors and administrators of deceased petty officers, &c. Provided that any *prize* or *bounty money* due to such deceased, shall be payable to such creditor only as follows, *i. e.*, if the pay and other money due from his majesty to the deceased is not sufficient to discharge the said debt so allowed, the deputy paymaster of the navy shall certify the amount of the wages, dead clothes, and other allowances actually paid to such creditors, at foot of such certificate: and such creditors shall not demand or receive from the treasurer of Greenwich Hospital, or any prize agent, his deputy, &c. to pay to such creditors or any other person for their use, or on their account,

any prize or bounty money due in respect of the services of the deceased. but the same shall be paid over as in cases of unclaimed prize money to the treasurer of Greenwich Hospital; and on the said creditors producing such certificate to the said treasurer, they shall receive so much of the said prize money (if so much is due) as shall discharge so much of their demands as remains unpaid: and the deputy paymaster of the Hospital may, on so paying the full amount of the debt, retain the certificate as a voucher: Provided that if there are more than one such creditor, the creditor whose claim has been first allowed shall be first satisfied, and afterwards the creditors in succession according to priority of allowance of their claims, but so as not to deprive any such creditor of any legal priority by specialty or on any other account; provided notice thereof in writing has been given to the treasurer of the navy, or of Greenwich Hospital, as the case may require, before actual payment of the demand of any other creditors or any part thereof.

[**Executors or administrators dying before receipt of wages, &c. due to deceased.**]

By § 21. Whenever the executor or administrator of a deceased petty officer or seaman, non-commissioned officer of marines, or marine, shall die, not having in his lifetime received all or any part of the wages, &c. due to the deceased for naval services; the inspector of seamen's wills, or his assistant may investigate the right of any person making application to the treasurer or paymaster of the navy in that behalf, to represent according to law the person of such deceased: and being satisfied of such right to certify the name and abode of such applicant on the check or certificate formerly issued by the inspector of seamen's wills and powers to the executors or administrators of such deceased, and that he in his judgment is the rightful representative of such deceased, and entitled to receive whatever money is or may become due in respect of such services. And thereupon if the wages, &c. due from his majesty for the services of the deceased, and the said prize and bounty money remaining unpaid at the decease of such executor or administrator, shall appear to the said inspector or his assistant not to amount, nor likely by future payments to amount, to more than 20*l.*, it shall be lawful for the treasurer and paymaster of the navy, prize agent, and proper officers of Greenwich Hospital to pay to such person or his lawful attorney, all such wages, &c. so due, or which may become payable as aforesaid, without requiring such person to take out fresh letters of administration, any law to the contrary notwithstanding; but if such wages, &c. amount or appear to the inspector of seamen's wills to be likely to amount to more than 20*l.*, then such wages, &c. shall not be paid except on fresh letters of administration to be obtained in the regular way.

By § 22. The deputy paymaster on receiving such check or

certificate as above addressed to him, as the case may be, shall cause the whole of the wages due thereon to be calculated and ascertained in the usual manner; in which calculation, consideration shall be had to the proctor's charge (if incurred), which shall be deducted from the said wages, and be immediately paid to the said proctor or his agent: and the amount due on such check or certificate being so ascertained, and the proctor's charge deducted, the net balance, or that part thereof which may be due to the administrator, executor, widow, or next of kin, or person named as executor, shall immediately be paid to him, if present; and the check or certificate on which the same was so paid shall also be delivered to him, that it may remain in his hands, and stand in place of letters of administration or probate, &c. as authority to receive whatever other sums may be due or become due to the deceased's estate. by deputy paymaster.]

In case the said executor, or administrator, widow, next of kin, or creditor, or person named as executor, shall not be present, but be and reside at a distance, the said deputy paymaster or treasurer's clerk shall make out a *remittance bill or bills* for the net balance, or that part of it ascertained as aforesaid in the following form, or to the like effect. [Remittance bill; its form, signature, &c.]

' No.

' Day of

	£ s. d.
' Sir, ' Pay to *B. C.* of ' on his [her or their] producing and delivering ' the duplicate hereof, the sum of ' being on account of the wages of *D. E.* belong- ' ing to his majesty's ship the if ' the same be demanded within six calendar ' months from the date hereof, otherwise you are ' to return this bill to the treasurer of the navy ' at the pay office of the navy, London.	

' To { The receiver-general of the land tax, in the county of
The collector of the customs at the port of
The collector of the excise at
The clerk of the cheque at }

' Signed [*F. G.*] commissioner of the navy.
' Attested [*H. I.*] clerk to the treasurer of the navy.
' By virtue of the act fifty-fifth *George* third, ch.

' *N. B.*—The personating or falsely assuming the name and ' character of any person entitled to receive the wages of any ' inferior officer or seaman, non-commissioned officer of marines, ' or marine, or procuring any other to do the same; or forging ' or uttering, knowing the same to be forged, any letter of at-

'torney, bill, ticket, certificate, or assignment, last will, or other 'power or authority; or taking a false oath to obtain probate 'of a will or letters of administration, in order to receive wages 'due to such officer or seaman, non-commissioned officer of 'marines, or marine, or demanding or receiving such wages 'due to such officer or seaman, non-commissioned officer of 'marines, or marine, under probate of will, or letters of ad-'ministration, knowing the will to be forged, or the probate or 'administration to have been obtained by means of a false oath, 'is made felony without benefit of clergy, by the fifty-fifth of '*George* the third, chapter 60.

'The officer to whom the aforegoing bill is addressed, is di-'rected by act fifty-fifth *George* the third, chap. 60. to examine 'the duplicate thereof when presented, and enquire into the 'truth, by the oath of the person presenting the same; and 'being satisfied, he is to testify to that purpose upon the back 'of the bill, and pay the amount without fee or reward; but if 'he shall not be able to pay the amount from not having public 'money sufficient in his hands, he shall note the cause of his 'refusing payment, and shall appoint another day within one 'month at farthest from that time, and shall deliver back the 'bill so noted to the person presenting it; and if upon com-'plaint to the commissioners of the board of revenue, on whose 'officer such bill shall have been drawn, it shall appear that 'such officer hath unnecessarily delayed payment, taken any 'fee, or made any deduction whatsoever, he shall be fined in a 'sum not exceeding fifty pounds.'

[How signed, &c.] And which bill shall be signed, attested, forwarded, and transmitted as directed in 31 *G.* 2. *c.* 10. § 14.; and shall be made payable to such persons only as shall be expressed as administrators, executors, widows, next of kin, or creditors in the check or certificate issued as before directed by the inspector; and all the money payable by the treasurer of the navy upon such check of administration, probate of will, administration with will annexed, or certificate, being made into a remittance bill or bills, the treasurer's clerk shall examine the said check, and if it appears that there are no further sums due by the said navy treasurer, but that the full sum due by him on such authority has been paid, the said clerk shall enclose the said check in the letter or cover which contains the remittance bill, and forward it to the administrators, executors, widows, next of kin, or creditors, that it may remain (with respect to any administrators or executors) in their hands, and stand in the place of the original administration or probate, as authority to receive whatever other sums may be due to the deceased's estate. § 23. And by § 24. in absence of any navy commissioner comptrolling the payment of

wages at any of the outports, the senior officers of his majesty's dock-yard may sign remittance bills. (The regulations affecting payment of remittance bills, cancelling and renewing them, allowing them in accounts, &c. are contained at great length in § 25. 28.)

By § 30. If any person shall sign any petition or application to the treasurer or paymaster of the navy, falsely and wilfully representing himself or herself to be the widow, or nearest, or one of the nearest of kin, of any deceased petty officer or seaman, non-commissioned officer of marines or marine, who has belonged to or served on board any of his majesty's ships; or utter or publish any such petition so signed, containing such false, &c. representation as aforesaid, in order to obtain a certificate from the inspector of seamen's wills, and powers to procure letters of administration to the effects of any such petty officer or seaman, non-commissioned officer of marines or marine, or to procure payment of any wages, pay, prize, or bounty money, or other allowances of money under 20*l*., for or in respect of naval services; or if any person shall demand or receive any wages, &c. due or supposed to be due for the services of such petty officer, &c. by virtue of any certificate from the said inspector, knowing it to have been obtained by false pretences; every such person shall on being convicted be transported beyond seas for seven years as a felon. [Falsely representing next of kin, &c.]

By § 31. If any person shall falsely make, forge, or counterfeit, or procure to be falsely made, &c. or willingly assist in the false making, &c. the signature of any minister or householder of any parish to any certificate annexed, or subjoined to, or contained in any check or petition for a certificate, as required, described, and mentioned in this act, to enable any person or persons to obtain probate of any will or letters of administration to any such petty officer, &c.; or shall utter or publish as true any such certificate annexed to or contained in any such check or petition, with any false or counterfeited signature of any such minister or householder of any parish subscribed thereto, knowing the same signature to be false or counterfeited, with intent to defraud; he or she shall, on conviction, be deemed guilty of felony, and be transported as such for his or her natural life, or for fourteen or seven years, as the court shall adjudge. [Forging, &c. names of ministers.]

By § 32. If any person shall knowingly personate or falsely assume, or procure any other person to personate or falsely assume the name or character of any commission, warrant, or petty officer, seaman, or any commissioned or non-commissioned officer of marines or marine, or any other person entitled or supposed to be entitled to any wages, prize, or bounty money, or other allowances of money for services performed or supposed to have been performed on board of any ship of his majesty, or [Personating, &c. officer, seaman, or marine. (And see 1 & 2 *G.* 4. *c.* 49. § 3.)]

the wife, widow, executor, or administrator, relation, or creditor, of any such officer, &c. in order to receive any wages, &c. due or supposed to be due for the naval services of any such officer; or shall forge or alter, or cause or procure the same to be done, or act or assist in forging or uttering any letter of attorney, bill, ticket, certificate, (purporting to be a certificate from the inspector of seamen's wills and powers, or his assistant,) assignment, last will, or other power soever, in order to receive or enable any other person to receive any wages, &c. due or supposed to be due for naval services performed or supposed to have been performed on board of any vessel of his majesty, his heirs, or successors, with intent to defraud; or shall utter or publish as true, any false, forged, or altered letter of attorney, &c. (*as above*) in order to receive any such wages, &c. with intent to defraud, knowing the same to be false, forged, or altered, (and see 1 & 2 *G.* 4. *c.* 49. § 4.); or shall willingly and knowingly take a false oath, or cause or procure any other person to take a false oath, or to obtain probate of any will, or to obtain letters of administration, in order to receive or enable any other person to receive any such wages, &c. due or supposed to be due for any such services (and see 1 & 2 *G.* 4. *c.* 49. § 4.); or shall demand or receive any wages due or supposed to be due for or in respect of like services, of or by virtue of any probate of any will or letters of administration, knowing the will on which such probate has been obtained to be false and counterfeited, or knowing such probate or letters of administration to have been obtained by means of any such false oath, with intent to defraud: then every such offender, on conviction, shall be deemed guilty of felony, and shall suffer death without clergy.

[Forging, &c. letter of attorney, &c.]

[Uttering forged, &c. letter of attorney, &c.]

[False oath to obtain probate of will, letters of administration, &c.]

[Receiving wages, &c. by false probate.]

[Knowing probate, &c. to be obtained by false means.]

And by § 33. it is enacted, That for the purposes of this act, every part of the complement of every ship in his majesty's navy shall be petty or inferior officers, seamen, non-commissioned officers of marines or marine, excepting such as appear by the ships' books to be admirals or flag officers, captains, lieutenants, masters, second masters, and pilots, physicians, surgeons, assistant surgeons, chaplains, secretaries to flag officers, and their clerks, pursers, boatswains, gunners, carpenters, and commissioned officers of marines. By § 34. penalties incurred under this act, which are applicable to the use of Greenwich hospital, may be sued for by the treasurer of the navy, in his own name, or in that of any other person by his authority. By § 35. all such penalties so sued for shall, when recovered, go to the use of Greenwich hospital.

[Who shall be deemed *petty officers* within this act.]

[Penalties to go to Greenwich hospital.]

By § 41. All letters and packets addressed to, or sent by the navy treasurer or paymaster, shall be sent and received free from postage, in the same manner, and under the same restrictions, (see 9 *G.* 3. *c.* 35. § 7. 42 *G.* 3. *c.* 63. § 5.) as the clerk assistant,

[Letters, &c. of navy treasurer, paymaster, and inspec-

and chief clerk, without doors of the house of commons, now send and receive the same. By § 42. All letters and packets addressed to and sent from the inspector of seamen's wills, and letters of attorney for the time being, or his assistant, upon any business relating to the said office of inspector, shall be free from postage; and all letters, &c. on any business relating to the said office of inspector of seamen's wills, that shall be forwarded by such inspector or his assistant, shall be under cover, with the words, "Pursuant to act of parliament, 55 *Geo.* 3.," printed thereon; and the said inspector, or his assistant, shall write his name under the same. See 49 *Geo.* 3. *c.* 108. § 8.

tor of seamen's wills, to go free.]

' CERTIFICATE.

' Navy Pay Office,
' day of 18 .

' HAVING duly examined a claim, presented to me as inspector of seamen's wills and letters of attorney, by *A. B.* of stating that he, she, [*or* they] is or are the creditor or creditors of *C. D.* originally of and lately a seaman [*or* marine] of his majesty's ship and who died at on the day of I hereby certify, That the stated demands in writing presented to this office by the said *A. B.* as creditor [*or* creditors] of the said *C. D.*, under the authority of the act passed in the fifty-fifth year of his majesty king *George* the third, chapter section have been duly examined agreeably to the provisions of the said act; and that I believe the sum of to be due and owing by the late *C. D.* to the said *A. B.*; and that the said *A. B.* is [*or* are] therefore entitled to receive, by virtue of this certificate, the said sum of out of whatsoever wages, prize money, bounty money, or other allowances of money may be due to the said *C. D.* deceased, for his services in his majesty's navy, and no more.

' Signed (*J. B.*) Inspector.'

TABLE of FEES to be taken for probates of wills, letters of administration, and letters of administration with will annexed, of warrant and petty officers, and non-commissioned officers of marines, and also of common seamen and marines, in pursuance of this act.

PROBATES.

	Under what sum the effects sworn.	Where the deceased was a warrant or petty officer in the navy, or a non-commissioned officer of marines.		Where the deceased was a common seaman or marine.	
		If the executor be a wife, child, parent, brother, or sister of the deceased.	If the executor be more remotely related or a stranger in blood to him.	If the executor be a wife, child, parent, brother, or sister of the deceased.	If the executor be more remotely related or a stranger in blood to him.
	£	£ s. d.	£ s. d.	£ s. d.	£ s. d.
If the executor sworn in London - - -	20	— 7 —	— 16 6	— 7 —	— 16 6
	40	1 — 6	1 10 6	— 11 —	1 1 —
	60	1 4 —	1 13 —	— 14 6	1 3 6
	100	1 8 6	1 15 6	— 19 —	1 6 —
If the executor sworn in the country by commission -	20	— 19 —	1 12 —	— 19 —	1 12 —
	40	1 17 —	2 12 6	1 7 6	2 3 —
	60	2 1 6	2 15 —	1 12 —	2 5 6
	100	2 8 —	2 17 6	1 18 6	2 8 —

ADMINISTRATIONS, and ADMINISTRATIONS WITH WILL ANNEXED.

	Under what sum the effects sworn.	Where the deceased was a warrant or petty officer in the navy, or a non-commissioned officer of marines.				Where the deceased was a common seaman or marine.			
		If the administrator be a wife, child, parent, brother, or sister of the deceased.		If the administrator be more remotely related, or a stranger in blood to him.		If the administrator be a wife, child, parent, brother, or sister of the deceased.		If the administrator be more remotely related, or a stranger in blood to him.	
		Administrations intestate.	Administrations will annexed.	Administrations intestate.	Administrations will annexed.	Administrations intestate.	Administrations will annexed	Administrations intestate.	Administrations will annexed.
	£	£ s. d.	£ s. d.	£ s. d.	£ s. d.	£ s. d.	£ s. d.	£ s. d.	£ s. d.
If the administrator sworn in London -	20	0 12 6	0 15 0	1 3 0	1 8 0	0 12 6	0 15 0	1 3 0	1 8 0
	40	2 5 6	2 9 0	2 16 0	3 2 0	0 16 0	0 19 6	2 6 6	2 12 6
	60	2 9 0	2 14 0	3 6 6	3 14 0	0 19 6	1 4 6	2 17 0	3 4 6
	100	2 13 6	2 18 6	3 9 0	3 16 6	1 4 0	1 9 0	2 19 6	3 7 0
If the administrator sworn in the country by commission	20	0 19 6	1 2 0	1 13 6	1 18 6	0 19 6	1 2 0	1 13 6	1 18 6
	40	2 17 0	3 0 6	3 13 0	3 19 0	1 7 6	1 11 0	3 3 6	3 9 6
	60	3 1 6	3 6 6	4 2 6	4 10 0	1 12 0	1 17 0	3 13 0	4 0 6
	100	3 8 0	3 13 0	4 5 0	4 12 6	1 18 6	2 3 6	3 15 6	4 3 0

IV. *Of the probate of wills, and administration of intestates' effects.*

Which chapter divides itself into two parts; viz.

I. *Of the probate of wills.*
II. *Of the administration of intestates' effects.*

I. *Of the probate of wills.*

1. IT appears to have been a matter of great controversy, to whom the probate of wills and granting administration did originally belong, and whether these were matters entirely of ecclesiastical cognizance; but it seems now to be the better opinion, that the probate of testaments did not originally belong to the ecclesiastical jurisdiction, but to the county court, or to the court baron of the respective lord of the manor where the testator died, as all other matters did. 2 *Bac. Abr.* 398.

Origin of the jurisdiction.

The truth is, there were wills before there was any ecclesiastical jurisdiction; and consequently, the cognizance thereof pertained then solely to the civil magistrate. After the establishment of christianity, and of the ecclesiastical jurisdiction in England, [230] until the time of the Conquest, the courts ecclesiastical and temporal were conjoined, the bishop and earl sitting together for the transaction of business in the county court. Upon the separation of the courts in the time of king William the first (*x*), it doth not appear unto which of the two jurisdictions the cognizance of wills immediately acceded. But so early as the reign of king Henry the first, sir *Henry Spelman* observes that in Scotland the cognizance of wills belonged to the ecclesiastical jurisdiction; and he adds, doubtless then also in England. And *Glanvil* doth testify thus much in the time of king Henry the second; who saith, that if there be any dispute concerning a testament, the same is to be heard and determined in the court christian. *Spelm. Rem.* 132.

And in the preamble of the statute of the 18 *Ed.* 3. *st.* 3. *c.* 6. it is expressed that *causes testamentary notoriously pertain to the cognizance of holy church.*

Nevertheless, from the constitutions and laws which were made of ancient time against lords of manors detaining the goods of the deceased in prejudice of their creditors, of their families, and of their souls; it seemeth that the lords of manors did for some time retain a jurisdiction with respect to the goods of their deceased vassals. And from this source possibly may be deduced the power of granting probate of wills and administration of in-

(*x*) See Courts, 3.

testates' effects that still remaineth in divers manors. Which power having been enjoyed time out of mind, and without interruption, is allowed to be good. And where the lord of a manor hath the probate of testaments within his manor, if such will be proved in the ecclesiastical court, a prohibition lieth; because the jurisdiction thereof belongeth to another: else the party might be doubly vexed. 5 *Co.* 73. 2 *Bac. Abr.* 402. (*y*)

But, excepting in such like particular cases, it is now certain, however it might have been formerly, that the spiritual court is the only court that hath jurisdiction of the probate of wills; and, as incident to such jurisdiction, hath power to determine all those matters that are necessary to the authenticating thereof. 2 *Bac. Abr.* 398.

[231] And the reason why the probate of testaments hath been given unto spiritual men is, because it is to be intended, that they have more knowledge what is for the profit and benefit of the soul of the testator, than laymen have; and that they will look more than laymen, that the debts of the deceased be paid and satisfied out of his goods, and that they will see his will performed, so far as his goods will extend. *Perk.* 213. (*z*)

Bishop. 2. And, generally, the person before whom the testament is to be proved is the bishop of the diocese where the testator dwelled, or his officer. *Swin.* 427.

[Archdeacons.] *Archdeacons* as such have no power to grant probate, or commit administration, although most archdeacons in England do it;

(*y*) The granting of probates of wills regularly belongs to the ecclesiastical courts; but some courts baron have this right by prescription, as the manor of Mansfield, and those of Cowle and Caversham in Oxfordshire. *Wentworth Off. of Executor*, 43.

(*z*) The reader will find the jurisdiction of the ecclesiastical courts in wills traced with great learning in Ch. B. *Gilbert*'s argument in the case of *Marriot* v. *Marriot*, *Gilb. Eq. Rep.* 203. and *Stra.* 666. This power appears to have been assumed by them by degrees, after the charter of Will. I. separated the ecclesiastical from the hundred or county court. See Courts, 3. In the Roman law, we find that *Justinian*, *Cod.* 1. 3. 28., enables bishops or their superiors to sue for legacies left to pious uses, such as to support the poor, redeem captives, &c. But he prohibits them from proving or registering wills, which it appears they had attempted; confining that power to the secular magistrate. *Cod.* 1. 3. 41. & 6. 23. 33. It is remarkable that before the introduction of christianity, the pontifical college at Rome could compel an heir to perform the will of the deceased in certain cases where no action was given by the civil law, as where a monument was to be erected. *Dig.* 5. 3. 50. [As to the exclusive jurisdiction of the ecclesiastical court to decide on fraud in obtaining wills, or the sanity of the testator so far as relates to *personal* estate, see *infra*, 238. *note* 8. by the Editor.]

but they do it, not as archdeacons, but by a prescriptive right. *Gibs.* 478. (3)

3. But there are also certain peculiar ecclesiastical jurisdictions, where by prescription, or composition, or other special title, the probation and approbation of the testaments of such as dwell and die within those places doth appertain to the judge of that peculiar. *Swin.* 427. **Peculiar.**

Concerning which it is ordered by *Canon* 126., as followeth: Whereas deans, archdeacons, prebendaries, parsons, vicars, and others exercising ecclesiastical jurisdiction, claim liberty to prove last wills and testaments of persons deceased within their several jurisdictions, having no known or certain registers, nor public place to keep their records in, by reason whereof, many wills, rights, and legacies, upon the death or change of such persons, and their private notaries, miscarry and cannot be found, to the great prejudice of his majesty's subjects; we therefore order and [232] enjoin, that all such possessors and exercisers of peculiar jurisdiction shall once in every year exhibit into the public registry of the bishop of the diocese, or of the dean and chapter, under whose jurisdiction the said peculiars are, every original testament of every person in that time deceased, and by them proved in their several peculiar jurisdictions, or a true copy of every such testament, examined, subscribed, and sealed by the peculiar judge and his notary. Otherwise if any of them fail so to do, the bishop of the diocese, or dean and chapter, unto whom the said jurisdictions do respectively belong, shall suspend the said parties, and every of them, from the exercise of all such peculiar jurisdiction, until they have performed this our constitution.

4. All testaments are proved, and administrations granted, in the prerogative court of the several archbishops respectively, where the party dying within the province of such archbishop hath *bona notabilia* in some other diocese than where he dieth. 4 *Inst.* 335. **Archbishop's prerogative in case of *bona notabilia*.**

And this power is reserved in the statute of frauds and perjuries; by which it is provided, that nothing in the said statute

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(3) "The appointment of the bishop, as it regards the power of the commissary to prove wills, arms him with episcopal authority for that purpose: the grant of the power attracts to it all the means by which the power can be exercised. The commissary is bishop for the purpose of proving such wills as he is authorized by the grant to prove." *Per cur.* in *The King* v. *Yonge*, D. D., 5 *M. & S. Rep.* 119. In which case it was accordingly held, that a probate in the court of the archdeacon of *S.*, to whom the bishop granted full power to prove the wills of all persons deceased within the archdeaconry, was good; the testator having died within the same, though he was possessed of a term of years in lands lying within another archdeaconry in the same diocese.

shall extend to alter or change the jurisdiction or right of probate of wills concerning personal estates, but that the prerogative court of the archbishop of Canterbury, and other ecclesiastical courts, and other courts having right to the probate of such wills, shall retain the same right and power as they had before, in every respect: subject nevertheless to the rules and directions of the said act. 29 *C.* 2. *c.* 3. § 24.

And by the statute of the 23 *H.* 8. *c.* 9. (which directeth that persons shall not be cited out of their proper diocese) it is enacted, that the same shall not extend to the prerogative of the archbishop of Canterbury, for calling any person out of the diocese where he shall be inhabiting, for probate of any testament; nor shall be in any wise prejudicial to the archbishop of York, concerning probate of testaments within his province and jurisdiction, by reason of any prerogative. § 5. 7.

The law concerning this matter is, that five pounds is the sum or value of notable goods. But where by composition or custom in any county, *bona notabilia* are rated at a greater sum, the same is to continue unaltered: as in the diocese of London, it is ten pounds by composition. 4 *Inst.* 335.

If he who dieth had goods in both dioceses, to the amount of 5*l.* in the whole, the same shall be *bona notabilia*, and consequently under the archbishop's jurisdiction. 1 *Roll. Abr.* 908, 909.

[233] *Rolle* says, If a man dieth in one diocese, not having any goods there, but had *bona notabilia* in another diocese; this shall be sufficient *bona notabilia* for the archbishop to grant administration; because the ordinary where he dieth, by the law is to take as great care of the testator and of his goods, as the other ordinary where the goods are. And he saith, Mr. *Selden* told him, that he had been informed by those of the court christian, that this is the usual course there. 1 *Roll. Abr.* 909.

But if a man die upon a journey, the goods that he then hath about or with him, shall not be as *bona notabilia*, to cause administration to be committed, or the will to be proved in the prerogative. *Swin.* a. 438, 439.

[But if a party die abroad, leaving effects within one diocese only, it was the opinion of Sir *W. Wynne*, who cited *Humphreys* v. *Ingledon*, 1 *P. Wms.* 753., that it was not necessary to take a prerogative administration; but if a legatee is prevented from filing a bill in chancery for want of such probate in the archbishop's court, it would be granted from the necessity of the case. (4)]

By the statute of the 4 *An. c.* 16. Whereas great trouble and expence is frequently occasioned to the widows and orphans of

(4) *Yorkney* v. *Foyster, MSS. Cas.* 97.

persons dying intestate to monies or wages due for work done in her majesty's yards or docks, by disputes happening about the authority of granting probate of the wills and letters of administration of the goods and chattels of such person; for the preventing thereof, it is enacted, that the power of granting probates of the wills and letters of administration of the goods and chattels of such persons is hereby declared to be in the ordinary of the diocese, or such other persons to whom the ordinary power of probate of wills or granting letters of administration do belong, where such persons shall respectively die; and that the wages, or pay, due from the queen to such persons, for work done in any of the yards or docks, shall not be taken or deemed to be *bona notabilia* whereby to found the jurisdiction of the prerogative court. § 26.

Debts owing to the testator are *bona notabilia*, as well as goods in possession. 1 *Roll. Abr.* 909.

And they shall be *bona notabilia* in that diocese where the bonds or other specialties be, and not where the debtor inhabits. 1 *Roll. Abr.* 909.

But if the debts be only by simple contract, without specialty, then they are to be esteemed *bona notabilia* in that place where the debtor is. *Went.* 46.

Judgments obtained in the courts at Westminster, upon actions laid in the country, are *bona notabilia*, not where the action was laid, but where the judgment was obtained, because the record is there. [*Gold and another* v. *Strode*,] *Carth.* 148. (*a*)

E. 12 *W. Hilliard* and *Cox*. In debt by an administrator on an administration committed by the bishop of London, the defendant pleaded in bar, that the intestate at the time of his death was resident in another diocese. And it was held good upon demurrer. And by the court:

The simple contract debts are personal, and administration [234]
must be committed of them where the party dies. And if a man hath two houses in several dioceses, and lives most at one, but sometimes goes to the other, and being there for a day or two, dies; administration of his personal estate shall be granted by the bishop of this diocese, for he was commorant there, and not there as a traveller. 1 *Salk.* 37.

A bill of exchange shall be said to be *bona notabilia* where the debtor is, and not where the bill is; for it is no specialty in law: for if an executor pays debts upon simple contract, or suffers

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(*a*) To obtain money out of the court of chancery, however small the amount, a *prerogative* probate is necessary. *Challnor* v. *Murhall*, 6 *Ves.* 118. *Newman* v. *Hodgson*, 7 *Ves.* 409.; and *Thomas* v. *Davies*, 12 *Ves.* 417. [Or, if above 50*l.* *Docker* v. *Horner*, 3 *Bro. C. C.* 249.]

gment to pass against him; in such actions he may plead such payment or judgment in bar to an action upon a bill of exchange. *Yeoman* and *Bradshaw*, 3 *Salk.* 164.

In case lands be given to executors for payment of debts or legacies, it seemeth that this shall not be *bona notabilia*, although it be assets. *Went.* 46.

Where one dies possessed of goods in London and Dublin; in that case the resolution seems to have been, that the archbishop of Canterbury by his prerogative was to grant administration of the goods in London, and the archbishop of Dublin for those in Dublin. *Gibs.* 472.

In case one have *bona notabilia* both in the province of Canterbury and in the province of York, the will must be proved either before both metropolitans, if within each of their jurisdiction there be *bona notabilia* in divers dioceses; or else, if there be not so in any of the places, then before the particular bishops in those several dioceses where the goods are. *Went.* 46.

Or, if within the one jurisdiction metropolitan the testator had goods in divers dioceses, and in the other but in one diocese; then in the one place is the will to be proved before the archbishop, and in the other place before the particular bishop, as it seemeth. *Went.* 47.

Where one dies possessed of goods in the diocese of an archbishop, and in a peculiar of the same diocese; there shall be several administrations, and the archbishop shall have no prerogative, because the peculiar was first derived out of his jurisdiction. *Gibs.* 472. *Cro. El.* 719.

But where one dies possessed of goods in several peculiars within the same diocese, in that case administration shall not be granted by the bishop of the diocese, but by the metropolitan; inasmuch as they are exempt from ordinary jurisdiction. *Gibs.* 472. *Swin.* a. 440.

[235] By *Canon* 92. Forasmuch as many heretofore have been by apparitors both of inferior courts and of the courts of the archbishop's prerogative much distracted, and diversly called and summoned for probate of wills, or to take administrations of the goods of persons dying intestate, and are thereby vexed and grieved with many causeless and unnecessary troubles, molestations, and expences; we constitute and appoint, that all chancellors, commissaries, or officials, or any other exercising ecclesiastical jurisdiction whatsoever, shall at the first charge with an oath all persons called, or voluntarily appearing before them, for the probate of any will, or the administration of any goods, whether they know, or (moved by any special inducement) do firmly believe, that the party deceased (whose testament or goods depend now in question) had at the time of his or her death any goods or good debts, in any other diocese or dioceses or peculiar juris-

diction within that province than in that wherein the said party died, amounting to the value of *5l.* And if the said person cited or voluntarily appearing before him, shall upon his oath affirm, that he knoweth, or (as aforesaid) firmly believeth, that the said party deceased had goods or good debts in any other diocese or dioceses, or peculiar jurisdiction within the said province, to the value aforesaid, and particularly specify and declare the same; then shall he presently dismiss him, not presuming to intermeddle with the probate of the said will, or to grant administration of the goods of the party so dying intestate. Neither shall he require or exact any other charges of the said parties, more than such only as are due for the citation and other process had, and used against the said parties, upon their further contumacy; but shall openly and plainly declare and profess that the said cause belongeth to the prerogative of the archbishop of that province: willing and admonishing the party to prove the said will, or require administration of the said goods, in the court of the said prerogative, and to exhibit before him the said judge, the probate or administration under the seal of the prerogative, within forty days next following. And if any chancellor, commissary, official, or other exercising ecclesiastical jurisdiction whatsoever, or any their register, shall offend herein, let him be *ipso facto* suspended from the execution of his office, not to be absolved or released until he have restored to the party all expences by him laid out, contrary to the tenor of the premises; and every such probate of any testament, or administration of goods so granted, *shall be held void and frustrate* to all effects of the law whatsoever. Furthermore, we charge and enjoin that the register of every inferior judge do, without all difficulty or delay, certify and inform the apparitor of the prerogative court, repairing unto him once a month and no oftener, what executors or administrators have [236] been by his said judge for the incompetency of his own jurisdiction dismissed to the said prerogative court within the month next before; under pain of a month's suspension from the exercise of his office for every default therein. Provided that this canon, or any thing therein contained, be not prejudicial to any composition between the archbishop and any bishop or other ordinary, nor to any inferior judge that shall grant any probate of testament or administration of goods to any party that shall voluntarily desire it, both out of the said inferior court, and also out of the prerogative. Provided likewise, that if any man die *in itinere*, the goods that he hath about him at that present shall not cause his testament or administration to be liable unto the prerogative court.

Shall be held void and frustrate] In the case of *Smith* and *Bingham* (5) it was declared, that administration committed by

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(5) Or *Bingham* v. *Smeathwick*, *Cro. El.* 455. 457.

the archbishop by his prerogative, to one who did not die possessed of goods in divers dioceses, was merely void; which declaration was repeated in the case of *Turner* and *Vansdal* (6); But the more current doctrine is, that such administrations are not void, like those granted by a bishop, where are *bona notabilia*, but only voidable by sentence; because the metropolitan hath jurisdiction over all the diocese in his province, whereas a bishop can by no means have jurisdiction in another diocese. *Gibs.* 472.

In the case of Sir *Richard Rains* and the *Commissary of Canterbury*, *H.* 1 *An.*, it was said, that if administration be committed in a diocese where there are *bona notabilia*, though such grant be *ipso facto* void, yet they do not grant a new administration in the prerogative court before they repeal that; and in that case they shall not be prohibited. 7 *Mod.* 146.

And by *Canon* 93. Furthermore, we do decree and ordain, that no judge of the archbishop's prerogative shall henceforward cite or cause to be cited *ex officio* any person whatsoever to any of the aforesaid intents, unless he have knowledge that the party deceased was at the time of his death possessed of goods and chattels in some other diocese or dioceses, or peculiar jurisdiction within that province, than in that wherein he died, amounting to the value of *5l.* at the least: decreeing and declaring, that whoso hath not goods in divers dioceses to the said sum or value, shall not be accounted to have *bona notabilia*. Always provided, that this clause here, and in the former constitution mentioned, shall not prejudice those dioceses where by composition or custom *bona notabilia are rated at a greater sum*. And if any judge of
[237] the prerogative court, or any his surrogate, or his register or apparitor, shall cite or cause any person to be cited into his court, contrary to the tenor of the premises; he shall restore to the party so cited all his costs and charges, and the acts and proceedings in that behalf shall be held void and frustrate. Which expences, if the said judge, or register, or apparitor shall refuse accordingly to pay; he shall be suspended from the exercise of his office until he yield to the performance thereof.

Are rated at a greater sum.] One of the sums mentioned by *Lindwood*, under which nothing should be reputed *bona notabilia*, is *23l.* *3s.* 0¼*d.* And *Plowden* fixes the sum at *10l.*; of which *Swinburne* saith, that it seemed to him to be the opinion most commonly received. *Gibs.* 472.

The probate of every bishop's testament, or granting of administration of his goods, although he hath not goods but within his own jurisdiction, doth belong to the archbishop. 4 *Inst.* 335.

Wills in the British colonies.

5. If there be a new and uninhabited country, found out by English subjects, as the law is the birthright of every subject, so

(6) 3 *Keb. Rep.* 262.

wherever they go, they carry their laws with them; and therefore such new-found country is to be governed by the laws of England; though after such country is inhabited by the English, acts of parliament made in England, without naming the foreign plantations, will not bind them: for which reason it has been determined, that the statute of frauds and perjuries, which requires three witnesses to a will, and that these should subscribe in the testator's presence, doth not bind *Barbadoes.* (7) But where the king of England conquers a country, it is a different consideration; for there the conqueror, by sparing the lives of the people conquered, gains a right and property in such people; in consequence of which, he may impose upon them what laws he pleases. [*Anon. T.* 1722.] *P. Will.* 75.

By the statute of the 25 *G.* 2. *c.* 6. "For avoiding doubts "concerning who shall be deemed *legal witnesses* to wills" (which is inserted before under the head *concerning the qualifications of the witnesses*) — "Whereas in some of the British colonies or "plantations in America, the act of the 29 *C.* 2. has been received "for law, or acts of assembly have been made whereby the "attestation and subscription of witnesses to devises of lands, "tenements, and hereditaments, have been required;" therefore to prevent doubts which may arise in relation to such attestation, it is enacted, that this act shall extend to such of the said colonies and plantations, where the said act of the 29 *C.* 2. is by act of assembly made, or by usage received as law, or where by act of [238] assembly or usage the attestation and subscription of a witness or witnesses are made necessary to such devise; and shall have the same force and effect in the construction of, or for the avoiding of doubts upon, the said acts of assembly, and laws of the said colonies and plantations, as the same ought to have in the construction of, or for the avoiding of doubts upon, the said act of the 29 *C.* 2. in England. [§ 10.]—Provided, that no devise or legacy shall be made void by this act, unless the will whereby such devise or legacy shall be given, shall be made after March 1st, 1753. [§ 11.]

An estate in the plantations is testamentary, and assets to pay debts; for if the executor hath goods of the testator in any part of the world, he shall be charged in respect thereof. 6 *Co.* 46. 2 *Ventr.* 358, 4 *Mod.* 226. (*b*)

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(7) So in *Bermuda. Sheddon* v. *Goodrich,* 8 *Ves.* 481., and in *Barbadoes, Anon.* 2 *P. Wms.* 75. Otherwise in *St. Kitt's. Becket and another* v. *Harden and another,* 4 *M. & S. Rep.* 1. A will in Dutch or Latin, which concerns land in England, must be so framed as to pass an estate according to our law. *Bovey* v. *Smith, M.* 1682, 1 *Vern.* 85. It is said that the Dutch never use the word "heir."

(*b*) It is common to send over copies of wills from the plantations to have them proved here. *Serjt. Hill's MSS.* [But a will of per-

An appeal from decree made in the plantations, lies only to the king in council. 2 P. Will. 261.

Wills of lands not subject to the ecclesiastical jurisdiction.

6. Wills only concerning goods and chattels are under the cognizance and direction of the ecclesiastical laws. *Gibs.* 463. (8)

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sonalty in a foreign country may be proved there, and need not be proved in England. *Jauncey* v. *Sealey*, 1 *Vern. Rep.* 397.]

(8) And with respect to wills of *personalty only*, it belongs exclusively to the ecclesiastical court, to determine questions of fraud in obtaining them, as well as the sanity of the testator. *Archer* v. *Moss*, 2 *Vern.* 8. *Nelson* v. *Oldfield*, *id.* 76. *Kerrick* v. *Bransby*, 3 *Bro. P. C.* 358. *Marriot* v. *Marriot*, *Stra.* 666. *Gilb. Eq. R.* 203. *Barnsley* v. *Powell*, *infra*, p. 239. *Bennet* v. *Vade*, 2 *Atk.* 324. *Meadows* v. *Duchess of Kingston*, *Ambl. R.* 756.; and see *ante*, 58, 59. *in notis.* And ecclesiastical sentences pronounced on a point directly within this sole and exclusive jurisdiction, are conclusive evidence on the same matter, coming incidentally into question in a *civil* case in another court. *Noel* v. *Wells*, 1 *Lev.* 235. 1 *Ld. Raym.* 262. 3 *T. R.* 130. Thus a probate unrepealed is conclusive evidence in *civil* cases of the validity of a will: and therefore payment of money to an executor who has obtained probate of a forged will, is a discharge to the debtor of the intestate, though the probate is afterwards declared null and void. *Allen* v. *Dundas*, 3 *T. R.* 125. But the sentence is not evidence of any collateral matter, which may possibly be collected or inferred from the sentence by argument. *Blackham*'s case, 1 *Salk.* 290. *Thompson* v. *Donaldson*, 3 *Esp. N. P. C.* 63.; and see 11 *St. Tri.* 261. *per De Grey* C. J. Nor is an unrepealed probate conclusive evidence of the validity of a will in a *criminal* case as, *e. g.*; an indictment for the forgery of the same will. *The King* v. *Gibson*, Lanc. Sum. Ass. 1802, *cor.* lord *Ellenborough* C. J. 2 *Pothier* by *Evans*, 356., overruling *The King* v. *Vincent*, 1 *Stra.* 481.; and see *The King* v. *Rhodes*, *id.* 703., *infra*, 263. 11 *St. Tr.* 261.

But the adverse party may shew that the probate is forged, because such evidence supposes that the spiritual court has given no judgment: or if the probate was granted by an inferior court, that the testator left *bona notabilia;* for then the court had not jurisdiction. 1 *Sid.* 359. *Bull. N. P.* 247. But evidence will not be admitted to prove that another person was appointed executor, or that the testator was insane (*Noel* v. *Wells*, 1 *Lev.* 236.); for that would be to falsify the proceedings of the ordinary, in cases where he is exclusive judge. Where parties are dissatisfied with a probate, chancery will suspend its determination till after trial, on its validity in the proper court; for equity cannot determine on the validity of a probate *adversarily:* but if it comes *incidentally* before it, and that incident is admitted, the court may determine it, and hold the parties bound by their admission; for an admission by a party concerned in matters of fact is stronger than if it had been determined by a jury, and facts are as properly concluded by admission as by a trial. There is no difference between parties admitting things proper to be determined by the court in which the admission is made, and the admission of things cognizable in another court, for they are equally bound. *Sheffield* v. *Duchess of Bucks*, 1 *Atk. R.* 630.; and see *Smallpiece* v. *Anguish*, 1 *Ch. Ca.* 75.

And the probate of testaments concerning lands only, and no goods contained therein, ought not to be in the spiritual court; and if there be a suit to compel to have the probate of such testaments, a prohibition lieth. [*Netter* v. *Brett* or *Percival.*] *Cro. Car.* 396. (9)

[Will of lands and goods shall be proved in ecclesiastical court.]

But where a will is concerning lands and goods, and so is a mixt will; the probate thereof shall be intire in the spiritual court, and ought not to be of parcels: but the probate of the will for the land will not prejudice the heir; for it shall not be evidence at the common law; nor the witnesses being there examined, shall such examinations be given in evidence at the common law. *Cro. Car.* 396. S. C. (1)

And where a will doth contain in it lands and goods generally, the courts temporal will not grant a prohibition to stay the probate thereof for the whole (2); but if in a special case, it be alleged, that the testator was of non-sane memory, or the like, a prohibition will be granted for the whole. For if the spiritual

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(9) Nor is there any occasion to prove a will in the spiritual court, in order to entitle a legatee to recover his legacy out of the real estate. *Tucker* v. *Phipps*, *T.* 1746, 3 *Atk.* 361. Nor is probate necessary for a will appointing testamentary guardians. *Gilliat* v. *Gilliat and another*, 3 *Phill. Rep.* 222.

(1) Probate will be granted even where it is doubtful whether some part of the property be not freehold; for though it would be wholly inoperative as to that, it will enure as to personalty bequeathed. *Thorold* v. *Thorold*, 1 *Phill. Rep.* 9.

(2) Thus in *Partridge*'s case, 2 *Salk. Rep.* 552, 553. (overruling *Marquis of Winchester*'s case, 6 *Rep.* 23.) prohibition to probate of will of lands and goods on suggestion of *non compos*, was denied; the court saying, that the statute of *H.* 8. never intended to lessen the jurisdiction of the ecclesiastical court as to probate of wills: and to grant a prohibition might be inconvenient; for without a probate the executor cannot sue for debts, which by this means may be lost and the will unperformed. As for granting it *quoad* the land, it would be vain; because it is no evidence either *pro* or *con* in any court of law, but a proceeding *coram non judice*: yet it is good as to the goods; and in *Lady Chester*'s case, 1 *Ventr. Rep.* 207., *Hale* said, that the ecclesiastical courts may prove a will which contains goods and lands, though formerly a prohibition used to go *quoad* the lands. See 1 *Mod. R.* 90. 2 *Sid.* 143. *Hardr.* 131. 2 *Roll.* 315. 1 *Sid.* 141. And in a case where a legacy of 800*l.* was bequeathed to E. B., payable at twenty-one or marriage, and E. B. died unmarried before twenty-one, as assets were admitted, *equity* will not grant an *injunction* to stay proceedings in the ecclesiastical court for recovery of the legacy, as they have a proper jurisdiction for legacies charged on personal estate (*Bassett* v. *Bassett*, *M.* 1744, 3 *Atk.* 207.); and equity has always followed the rule of the ecclesiastical court, to whom the jurisdiction in personal legacies properly belongs. *Reynish* v. *Martin*, *T.* 1746, 3 *Atk.* 333.

court should be suffered to proceed, and prove the will there, and allow it there for the personal estate; it would be an evidence to induce the jury, upon a trial at law, to pass for the will as to the lands and tenements. *E.* 12 *J. Egerton* and *Egerton*, *Cro. Jac.* 346. (3)

Will of goods not effectual before probate.

7. But a devise of a personal estate is not looked upon to be of any effect until probate is made of the will by the executor: [* 239] * neither can an executor or other person give a will in evidence concerning a personal chattel without producing the probate; for this will is no will until it has received a sanction, or an allowance of it, in the spiritual court; for they are to judge whether it be a will or not; and the temporal courts are not to look upon it as a will till probate be made: And in an action of trover for goods which a testator gave to his sister in his lifetime, brought against his executor for them who would have given in evidence a former will, to have shewn that he had no power to give those goods; this was refused, because he ought to have produced the probate. *Chaunter* and *Chaunter*, 1708. *Viner*, *Executors*, A. a. 20.

And a probate obtained in the ecclesiastical court cannot be set aside in any other court either of law or equity. In the case of *Barnsley* and *Powel*, Aug. 5. 1748, a probate of a forged will was obtained in the ecclesiastical court, by a fraud upon the plaintiff in procuring his consent to such probate; and by the like means a decree in the court of exchequer was obtained to establish the said will as to the real estate. Upon these facts being disclosed, and a bill filed in chancery, an issue was directed to try the validity of the will at law, which the jury found to be forged. And the question was, what could now be done, especially with respect to the personal estate; and the decree in the exchequer likewise standing in the way with respect to the real estate. Lord *Hardwicke* said, as to the decree in the exchequer, the same having been obtained by fraud, though he could not set it aside, yet he could decree that no use should be made of it. As to the personalty, undoubtedly the jurisdic-

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(3) But such evidence could not be admitted. See *Netter* v. *Brett*, *Cro. Car.* 396. *supra*, from which it seems that the probate would be entire; and see *Partridge's* case in last note. Though a will may be good at law, it may be set aside in equity for a fraud. 1 *Cha. Rep.* 12. 66. (last edit.), and *Goss* v. *Tracey*, *M.* 1715. 1 *P. Wms.* 288. 2 *Vern.* 699. S. C. But see *contra*, *James* v. *Greaves*, 2 *P. Wms.* 270. *Bennet* v. *Vade*, 2 *Atk.* 324. *Webb* v. *Clavendon*, *ib.* 424. *Anon.* 3 *Atk.* 17. The question, whether the testator in a will of *land* is or is not *compos*, is entirely at law, and must be tried there (see *Goss* v. *Tracey*): *viz.* on an issue directed by the court of equity into the county where the will was made. *Ibid.* However, a court of equity has no jurisdiction to determine on the validity of a will either of real or personal estate. *Jones* v. *Jones*, 1817, *T.*, 3 *Meriv.* 162.

tion of wills of personal estate belongs to the ecclesiastical court, according to the rules of which court it must be tried, notwithstanding that the will is found forged by a jury at common law by examination of witnesses; which is sometimes unfortunate, causing different determinations: nor can this court help it. But in the present case his lordship decreed, that the defendant should consent in the ecclesiastical court to a revocation of the probate; and though he would not then decree the defendant a trustee of the personal estate (4), lest it might create some jealousy of infringing on the ecclesiastical court, yet he decreed an account of the personal estate to be taken, and the [240] same to be paid into the bank for the benefit of the parties entitled. 1 *Ves.* 119. 284. (5)

Refusal of an executorship.

8. He that is named executor cannot be precisely compelled to stand to the will, and undertake the executorship, unless he have already meddled with the goods of the testator as executor; for then, he is not only to be compelled to perform the office of an executor, but also, if he should refuse, and the ordinary commit the administration unto him, this refusal is void, and he shall be charged as executor. *Swin.* 384.

Therefore if the executor named in the testament resolve not to stand to the executorship, but to refuse the same; then must he beware that he do not administer the goods of the deceased as executor; for having once administered as executor, he may at any time after be compelled to undergo the burden of an executor, and also may be sued as executor by the creditors of the testator; though he cannot sue others as executor, for that he hath not the will under the ordinary's seal. *Swin.* 469.

And a person is then said to administer as executor, so as thereby he may be compelled to stand to the executorship, when he doth perform those acts which are proper to an executor;

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(4) As is the general course of courts of equity when probates are obtained by fraud. *Tucker* v. *Phipps*, cited in *Barnesley* v. *Powell.* Or the fraud affects only a part of the will. *Marriot* v. *Marriot*, *Stra.* 666.

(5) And in *Montgomery* v. *Clark*, 2 *Atk. Rep.* 379., lord *Hardwicke* said, he had often thought it a very great absurdity that a will which consists both of real and personal estate, notwithstanding it has been set aside at law for the insanity of the testator, shall still be litigated on paper depositions only in the ecclesiastical court, because they have a jurisdiction on account of the personal estate disposed of by it. He wished gentlemen of abilities would take this inconvenience and absurdity into their consideration, and find out a proper remedy by the assistance of the legislature. But it seems that, as the law now stands, the court of chancery cannot interpose so as to *stop* the proceedings in the ecclesiastical court on wills of goods, or mixed wills of lands *and* goods. See *ante*, 238 *a*, *note* (2).

as to pay the debts due by the testator, or to receive any debts due unto the testator, or to give acquittances for the same, with other such like acts. *Swin.* 469.

But if a man do those acts which are not proper to an executor, he is not said to have administered as executor to the effect as aforesaid; as to feed the cattle of the deceased, lest they should perish; or to take into his custody the goods of the deceased, to the end they may be safe from being stolen or purloined; or to dispose of the testator's goods about the funeral (6): for these be deeds of charity common to every christian, and not peculiar to an executor. Likewise, to make an inventory of the goods of the deceased, is not to administer as executor; or to deliver to the wife her convenient apparel; or to take the testator's horse and ride him, or to use him as his own, supposing him not to be the testator's but his own; or to take the goods of the testator by his lawful gift. And generally, whosoever as a mere trespasser entereth on the goods of the testator, whether it be to things living, as horse, kine, sheep, or dead things, as pots,
[241] pans, dishes, converting the same to his proper use, and not to the use of the testator, as to the payment of the testator's debts or legacies, doth not administer as executor. *Swin.* 471, 472.

Howbeit, in these cases and such like, whosoever feareth to be adjudged executor administering of his own wrong, the most safe course is, not to meddle at all, but utterly to abstain from all manner of use of the testator's goods; and namely, let him beware that he do not sell any goods, or kill any cattle of the deceased. *Swin.* 472. [The next of kin, in case of intestacy by improper intermeddling, becomes only an *executor de son tort*, and cannot be forced by excommunication to take on him the administration of such goods, when it is alleged that he had not intermeddled. (7)]

Further, although a person hath not meddled with the goods of the testator, and is therefore not compellable; yet if a legacy be left to him, he may be compelled to stand to the executorship, or else to lose his legacy. *Gibs.* 469.

The refusal to take upon him the executorship cannot be by word only; but it must be entered and recorded in court. *Swin.* a. 443.

And when an executor hath once administered, he cannot afterwards refuse to prove the will, and take upon him the executorship; and in that case the ordinary ought not to accept such a refusal, but to compel him to prove the will, and take upon him the executorship. Yet if the judge doth admit one to

(6) *Stokes* v. *Porter*, *Dy.* 166 *b.* But until something is done upon a will, no one has an authority even to bury. *George* v. *George*, *M.* 1811, 18 *Ves.* 206.

(7) *Ackerley* v. *Oldham*, 1 *Phill. Rep.* 248.

administer, notwithstanding his having been formerly refused, it shall stand good. *Swin.* a. 443.

9. An executor of his own wrong is such as takes upon him the office of an executor by intrusion, not being constituted by the testator or deceased, nor (for want of such constitution) substituted by the ordinary to administer. *Went.* 171. (8) Executor of his own wrong.

If a man gets goods of an intestate into his hands after administration is actually granted, it doth not make him executor of his own wrong; but if he gets the goods into his hands before, though administration be granted afterwards, yet he remains chargeable as a wrongful executor, unless he delivers the goods over to the administrator before the action brought, and then he may plead *plene administravit.* 1 *Salk.* 313. (*c*)

An executor of his own wrong cannot bring an action; for he cannot shew the testament containing his name, as he ought. *Br. Administrator*, 8.

Neither can he retain for his own debt or legacy. *Mo.* 527. *Poph.* 125. (*d*) [242]

But he renders himself liable to the action, not only of the right executor, but also to the suits of the testator's creditors; yet only so far as the goods which he so wrongfully administered amount unto. *Swin.* 339. *Harr. Justin.* 87. *Vin. Executors*, E. a. 4, 5.

Webster v. *Webster*. In this case the defendant did not take out probate of the testator's will till sixteen years after his decease, but the court allowed the plea of the statute of limitations, on the ground that he had taken possession of the personal

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(8) And the slightest circumstance of intermeddling with intestate's goods will constitute a man *executor de son tort.* *Edwards* v. *Harben*, 2 *T. R.* 97. 587. 597.; and see the instances in that case. Living in the house, and carrying on the trade of deceased (a victualler), is sufficient intermeddling to make a defendant *executor de son tort*, and as such liable *de bonis propriis*, notwithstanding his wife proved the will after the action commenced. *Hooper* v. *Summersett*, *E.* 1810. *Wightw.* 16.; and see *Curtis* v. *Vernon*, 3 *T. R.* 587. *Vernon* v. *Curtis* (*in error*), 2 *H. Bl.* 18. Acting under a power of attorney given by an executor, after his death, makes an *executor de son tort.* *Cottle* v. *Aldrich*, 4 *M. & S.* 175.

(*c*) Per *Holt* C. J. S. P. *Curtis* v. *Vernon*, 3 *T. Rep.* 587.; affirmed in the exchequer chamber, 2 *H. Bla.* 18. See *Coulter*'s case, 5 *Rep.* 30. and 2 *Bac. Abr.* 390.

(*d*) Though he be a creditor of a superior nature. *Curtis* v. *Vernon*, *ubi supra.*

But if a wrongful executor afterwards procure administration, he may plead this *puis darrein continuance* to justify a retainer. *Vaughan* v. *Brown*, 2 *Stra.* 1106. If a creditor sell goods after the death of the debtor, under a bill of sale, which is set aside as fraudulent, because possession did not accompany and follow it, he may be sued as *executor de son tort.* *Edwards* v. *Harben*, 2 *T. Rep.* 587.

estate, and might have been sued as *executor de son tort*, long before he had obtained the probate. 10 *Ves.* 93.

So also, it is said, he shall be sued for legacies, as well as a lawful executor. *Noy.* 13.

But if he doth lawful acts with the goods, as paying of debts in their degrees, it shall alter the property against the lawful executor; as if he pay just and honest debts, the rightful executor shall not avoid that payment. It is true, the rightful executor may maintain against him an action of trover; but he shall only recover in damage so much as the wrongful executor hath misapplied. By *Holt* chief justice. 12 *Mod.* 471. (*e*)

But Mr. *Wentworth* is of opinion, that albeit such payment shall stand good as against other creditors, yet it is not good as against the rightful executor or administrator: for then any stranger might usurp the office of executor, and take from him that liberty and election, to prefer which creditor he will in first payment; yea, might take from the executor power to pay himself before others, in case there were a debt due to him, which would be unreasonable. *Went.* 182.

Mountford v. *Gibson.* In this case the court of king's bench decided, that a creditor of an intestate, who had received goods of the intestate after his death from his widow, in payment of his debt, cannot protect his possession against an action of trover by the lawful administrator, upon the ground of such delivery having been made by one who had by such intermeddling made herself *executrix de son tort*; no fact appearing to give colour to her having acted in the character of executrix, except the single act of wrong complained of, in which the defendant participated. 4 *East's Rep.* 441. [*Quære*, how far any payment by an *executor de son tort* to a creditor can be set up as a bar to an action of trover, by the lawful executor, &c.; though if it be such as the latter would have been bound to make, it shall be recompensed in damages. *Ib.*]

And as he himself is liable to the suit of the lawful executor, creditors, or legatees; so also, in case of his death, are his executors or administrators liable by the statute of the 30 *C.* 2. *c.* 7., although in other cases, a personal wrong dieth with him that did it. And although he hath obtained probate, yet if upon appeal such probate shall be annulled and made void, acts done
[243] by him pending the appeal shall not be good. As in a case of *M.* 5 *An.* in the common pleas. An action was brought by the plaintiff, as executor, for money due from the defendant to his testator. The defendant pleads, that another person was ap-

(*e*) S. P. by Buller J. in *Padget* v. *Priest*, 2 *T. Rep.* 97. And it is for the court to say what acts make an *executor de son tort*, but for the jury to decide whether they are sufficiently proved. *Ib.*

pointed executor to the testator, and proved his will, and that he, the defendant, had paid him part of the money in satisfaction of the whole, and that the said person on receipt thereof discharged the defendant. The plaintiff replied, that the probate granted to the other person was afterwards, upon appeal, annulled by sentence in the ecclesiastical court, and the will by which he was made executor adjudged to be forged, and the will by which the plaintiff is appointed executor allowed. On demurrer, the question was, whether payment to one who was executor *de facto*, and had probate of the will, was good to bind the rightful executor. And the court gave judgment, that it was not. And by *Trevor* chief justice: An executor derives all his authority from the testator himself; and as executor, without any thing more, he has the power of disposing of the estate of the testator, of releasing a debt due to the testator, and the like. True it is, before an action brought, a probate is necessary: but that is only requisite to inform the court that the plaintiff is executor and has a right to bring his action, not to give the plaintiff any title or interest to the estate of the testator. If the testator appoints no executor, or dies intestate, the administrator is appointed by the ordinary, and derives his authority from him; and therefore if administration is granted, all acts by him as long as the administration continues in force are good, and even though it be afterwards repealed. But there is a difference taken (6 *Co.* 18.) when an administration is repealed upon a citation, or upon an appeal. If it is upon an appeal, which suspends the administration, all acts after such suspension are void: if it is repealed upon a citation, all the acts of the administrator, till the repeal, are good; for by the citation the grant of the administration is not suspended; therefore if the administration be repealed, all acts done by an administrator which a rightful administrator might have done, shall be allowed, for in them he acted in the place of the rightful administrator. But it is otherwise in the case of an executor; for the probate of the will gives no authority at all to him: and therefore if he is not the rightful executor, he has no authority; and it would be unreasonable, that a person who has no authority should dispose of the interest of another. The rightful executor has not only a trust or authority to administer the goods of the testator, but also an interest annexed to the trust. And therefore the property of all the goods, after administration, is completely vested in him. And consequently, the disposition by another person of the goods of the testator, or release of his debts, is a disposition of the interest of the rightful executor, and therefore such disposition doth not bind him. And this case is not like the case of an officer, who officiated without legal authority, as the deputy of the deputy of a steward; for rightful acts done by him are good: for he is an officer *de facto*, [244]

and in the immediate and open execution of his office, and the parties did not know whether he had authority or not. — And he said, in this case of an executor some mischief indeed may possibly happen; but it would be a more general inconvenience, if a wrongful executor should be allowed to dispose of the right and interest of a rightful executor. *Comyn*, 150. *Anonym.*

Co-executors; some of them do refuse. (*g*)

10. Where there are divers executors named in the will, and some of them do refuse, and others of them prove the testament; they who refuse may after at their pleasure administer, notwithstanding such refusal before the ordinary. 9 *Co.* 37. *Bacon's Use of the Law*, 161. *Perk.* 212.(9)

And this is what in the spiritual court is called a double probate; which is in this manner: The first that comes in takes probate in the usual form, with reservation to the rest. Afterwards, if another comes in, he also is to be sworn in the usual manner, and an ingrossment of the original will is to be annexed to such probate in the same manner as the first; and in the second grant, such first grant is to be recited. And so on, if there are more that come in afterwards.

For notwithstanding their refusal at first, they still continue executors; and at any time during the lives of their companions, they may prove the will, they may pay debts, make releases, and they must be joined in all suits where the co-executors are plaintiffs, because they are all privy to the will; but not where they are defendants, because the plaintiff in the action is not bound by law to take notice of any but those who have proved the will. *Swin.* a. 444.

[245] For the king's courts have always used to allow the probate of some of the executors, to enable them all to sue actions: so that the probate of the testament doth not give to them any interest or title, either to things in action, or in possession, for they have

(*g*) Vid. *infra*, *Getting in the effects*, 27. [page 315, &c.]

(9) When a party is appointed executor by a formal instrument, the revocation must be either express, or by necessary implication; where, therefore, there was no such revocation, but only a subsequent appointment and substitution of other persons in lieu of two who had been originally appointed with him, the court held that the party who had been first appointed, and was not noticed in the subsequent alterations, ought to be joined with the latter in the probate. *Sherard* v. *Sherard*, 2 *Ph. R.* 251. An executor, according to the tenor, is entitled to be joined in the probate with the surviving executor of a wife. *Grant* v. *Leslie*, 3 *Ph. R.* 116.

The executor under a former will has a right to put the executor of a latter will upon solemn proof of that instrument, and to interrogate his witnesses; but if he goes beyond this, without being able to prove his case, he becomes liable to costs. *Mansfield* v. *Shaw*, 3 *Ph. R.* 22.

all their title and interest by the testament, and not by the probate: but yet without the probate, the judges allow them not to sue actions. [*Hensloe's* case,] 9 *Co.* 38.

It is holden, that he which did refuse the executorship, cannot assume that office after the death of his fellow-executor. *Swin.* 326. 418. [*Dyer*, 160. b.]

But in the case of *House* and *Lord Petre*, Dec. 19. 1700, before the delegates: The common lawyers held, that if one executor refuseth before the ordinary, and the rest prove the will, yet at common law, he who refused may at any time come in and administer; and though he never acted whilst his companions were living, yet after their death he shall be preferred before any other executor made by a co-executor; although the civilians held, that by their law, the renunciation was peremptory. 1 *Salk.* 311. (*h*)

11. If a man maketh two executors and dieth, and one of them proveth the will in the name of them both, against the will of the other; this is not any administration for him who consented not to the probate: but he may plead *ne unques executor;* for the probate maketh him not executor, if he doth not administer. 1 *Roll's Abr.* 918. **Where one executor excludes the other.**

12. Swinburne says, when all the executors named in the testament do refuse, it is lawful for the bishop or ordinary to commit administration, and to annex the will to the letters of administration, and the administrators shall have action, and may administer the goods of the deceased, as if he had died intestate; and their authority or act done, is good and effectual in the law in the mean time, until the executors undertake the executorship; [246] **Where all refuse; administration to be committed.**

(*h*) *The King* v. *Sir Edward Simpson*, 3 *Burr.* 1463.; and 1 *Bla. Rep.* 456. A motion was made for a mandamus to the judge of the prerogative court of the archbishop of Canterbury, to admit the retraction of a renunciation of an executorship made by one Brown. There were two executors, and probate had not been granted to either, but Brown had taken the oath of renunciation, "that he had not, and would not, intermeddle in the effects, &c. but renounced all right of execution of the will." Against the mandamus, it was said, that by the law and practice of the ecclesiastical courts, no retraction could be admitted of a renunciation upon oath, which would be to admit him who renounces to perjure himself for it; for the mandamus, that upon good cause the court below can absolve from the oath, and the common, not the canon law, must govern this point, by which an executor has a right to demand probate, although he has renounced. But the parties entered into a rule by consent that probate should be granted to both executors, (who were also trustees, but insolvent,) they giving proper securities and indemnifications to each other, and to the *cestuy que trust.* [The consent of one executor, either in or out of court, will bind the others. *Holkirk* v. *Holkirk*, 4 *Madd. R.* 51.]

for then the ordinary may revoke the administration before by him committed. *Swin.* 380. 383. 1 *Roll's Abr.* 907.

So also if a man make an executor, but this is not known, or is concealed: the ordinary may grant administration, and this shall be good until the other prove the will. 1 *Roll's Abr.* 907.

And so in like manner, if the person be disabled to be executor, or no executor at all be named in the will. *Swin.* 380.

But (lord *Coke* says) if they shall refuse before the ordinary, and the ordinary commit administration to another, there they cannot administer afterwards. 9 *Co.* 37.

And by lord chancellor *Talbot*, in the case of *Robinson* and *Pett*, *E.* 1734. Where there are two executors, and one renounces, he is still at liberty, whenever he pleases, to accept of the executorship; otherwise if both renounce, and the ordinary commits administration to another. 3 *P. Will.* 251.

Within what time the will shall be proved.

13. Regularly [that is, by the civil law], testaments ought to be insinuated to the official or commissary of the bishop of the diocese, within four months next after the testator's death. *Swin.* a. 447.

What the executor may do before probate.

14. And the executor, for goods of the testator taken from him, or a tresspass done upon the lease land, or a distraining or impounding of goods or cattle, may maintain, before the will be proved, actions of trespass, or replevin, or detinue; for these actions arise upon the executor's own possession. *Went.* 34.

But before the proving of the will, an executor cannot maintain a suit or action of debt, or the like: and the reason is, for that therein he must shew forth the will proved under the seal of the ordinary. *Went.* 34.

And in general, an executor is a complete executor before probate, to all purposes but bringing of actions; so that he may release an action, assent to a legacy, may be sued, may alien, or otherwise intermeddle with the goods of the testator. 1 *Salk.* 301. (1)

[247] For by administering, the executor hath accepted of, and taken upon him, the whole administration before the probate; and is

(1) The interest of an executor arises not from the probate, but from the testator, and therefore he may release a debt, or assign a term before probate: but the right of an administrator arises from the ordinary, *Hudson* v. *Hudson*, 1 *Atk. R.* 461. See *Wills* v. *Rich*, 2 *id.* 286. note 1. *Mead* v. *Lord Orrery*, 3 *id.* 239. As the executor's right is derived from the will, the probate is only evidence of it, therefore he has a constructive possession from the testator's death. *Smith* v. *Milles*, 11 *T. R.* 480. Thus in trover by an executrix, to recover goods sold by a person who had taken out administration under a former will, but which had since been revoked, and before the sale the administrator had notice of the second will; it was held that the property vested in the executrix from the date of the will, and consequently the other had no right to sell. *Woolley* v. *Clark*, 5 *B. & A.* 744.—1 *D. & R.* 409. S. C.

thereby intitled to receive all debts due to the testator; and all payments made to him are good, and shall not be defeated, although he should die and never prove the will. 1 *Salk.* 306, 307.

Also the executor may, in convenient time after the testator's death, enter into the house descended to the heir, for the removing and taking away of the goods, so as the door be open, or at least the key be in the door: and this seemeth to be understood of the door of each room. For although the door of entrance into the hall and parlour be open, the executor cannot, by that, justify the breaking open of the door of any chamber to take the goods there; but only may take those in the rooms which be open. And this seemeth to be proved by the case of the chest with evidences; which, it is said, the executor may take and put out the deeds, delivering them to the heir, that is to say, the chest being unlocked. Now a chamber or other room within the house, locked, is an inclosure of better respect than a chest. But if the goods be not removed within convenient time, the heir may distrain them as damage-feasant. *Went.* 92.

T. 5 *Ja. Stodden* and *Harvey.* Trespass. Upon demurrer, the case was: Lessee for life of a house and pasture land dies; his executors suffer his cattle to go there for six days after his death, and then removed them; and in trespass, justify for that time, averring, that in that time of six days, they could not procure any other land or place to put in the cattle. Whereupon it was demurred. And whether that were a convenient time to remove them was the question. And the court seemed to incline, that six days is but a convenient time for the removing of their cattle; and the law allows a convenient time for their removing, especially it being averred, that they had not any other place to remove them unto. But for a fault in the plea, wherein he pleaded a lease of the house, but not of the land in the declaration mentioned, it was adjudged for the plaintiff. *Cro. Ja.* 204.

In like manner, the executor before probate, may be sued for the debts of the testator; unless he refused the executorship in due manner, so as administration may be granted, and so there be somebody suable for the testator's debts. *Went.* 36.

So a bill for discovery of effects may be brought before probate: As in the case of *Dulwich college* and *Johnson*, *E.* 1688. [248] A bill for a discovery of the personal estate was brought before the will was proved, the will being controverted in the spiritual court. And this was pleaded to the bill, but overruled; a discovery being for the benefit of all persons interested, and necessary for the preservation thereof. And such discoveries have often been ordered, *pendente lite* in the spiritual court. 2 *Vern.* 49.

And in the case of an administrator, a court of equity will allow of a bill brought by an administrator, before administration is actually taken out: as in the case of *Fell* and *Lutwidge*, Feb. 3.

1740. The widow brought a bill for recovery of the effects of her late husband, and did not take out administration till after the bill brought. It was objected, that the bill was brought too early. By the lord chancellor *Hardwicke*: It is very true that this would have been an exception in an action at law; but it is not so to a bill brought in this court. And the exception was overruled. *Bernard, Cha. Ca.* 320.

Ordinary to cite the executor to prove the will.

15. By the 21 *H.* 8. *c.* 5. The ordinary, or other person having authority for probate of testaments, may convent before them persons named executors of any testament, to the intent to prove or refuse the testament, as they might do heretofore.

And by the 1 *Ed.* 6. *c.* 2. All summons and citations or other process ecclesiastical, in all causes of probates of testaments, and commissions of administrations of persons deceased, shall be made in the name and with the style of the king, as it is in writs original or judicial at the common law; and the teste thereof shall be in the name of the archbishop or bishop, or other having ecclesiastical jurisdiction: and the commissary, official, or substitute exercising jurisdiction under him, shall put his name in the citation or process after the teste. § 3.

And the ordinary may sequester the goods of the deceased, until the executors have proved the testament; so may the metropolitan, if the goods be in divers dioceses. *Swin.* a. 477, 478.

And if the executors do not appear upon the process, the ordinary may excommunicate them. But they may pray time to advise: and the ordinary may grant in the mean time letters *ad colligendum bona defuncti*. *Treat. of Eq. b.* 4. *c.* 1. § 4. [*Broker* v. *Charter*, *Cro. Eliz.* 92.]

Mandamus to compel the ordinary.

16. On the other hand, (inasmuch as the executor, though he may be sued, and pay debts, and release an action, yet cannot *have* an action, before probate,) the ordinary is *bound* to prove the will; and if the executor accept, and desire probate, and is refused by the ordinary, a writ will go from the temporal courts [249] to compel him to proceed to probate, where the will is not controverted; and that notwithstanding an appeal to the delegates, as it was in the case of *Dunkin* and *Munn*, *M.* 26 *C.* 2., in which such writ was granted to the prerogative court. *Gibs.* 469.

But if the validity of the will is contested, it is a sufficient answer by the ordinary to a writ of mandamus, to return, that a suit is depending before him concerning the same, and not yet determined. 5 *Burr. R.* 2295. [*The King* v. *Dr. Hay.*]

Manner of proving the will.

17. The manner and form of proving testaments, is of two sorts: the one is called the *vulgar* or *common form*; the other is termed the *solemn form*, or *form of law*. *Swin.* 448.

The vulgar or *common form* is more compendious or brief than the other; for after the death of the testator, the executor presenteth the testament to the judge; and in the absence, and

without citing or calling of such as have interest, produceth witnesses to prove the same; who testifying upon their oaths *vivâ voce*, that the testament exhibited is the true, whole (2), and last testament of the party deceased, the judge doth thereupon (and sometimes upon lesser proof) annex his probate and seal to the testament, whereby the same is confirmed. *Swin.* 448.

It is not necessary to the proof of a written will, that the witnesses hear it read, so as they can depose that the testator declared before them, that the self-same writing now produced is or was his last will and testament. *God. O. L.* 66.

In [*Longford* v. *Eyre*,] 1 *P. Will.* 741. It is said, that in proving a devise of lands, the proper way is, that the witness should not only prove the executing the will by the testator and his own subscribing in his presence; but likewise that the rest of the witnesses subscribed their names in the testator's presence: and so one witness proves the full execution of the will. (3)

But in the case of *Townsend* and *Ives*, May 9. 1748; at the Rolls: A bill was preferred by the legatees to have the real

(2) Papers which may be of a testamentary nature, shall not be withheld from the court. *Langmead* v. *Lewis*, 2 *Phill. Rep.* 325.

(3) This is the practice *at law;* on the supposition that there are two others who would be allowed to give the same testimony. *Per Lee* C. J. in *Anstey* v. *Dowsing*, 2 *Str.* 1254. S. C. 1 *Bla. R.* 8. *Bull. N. P.* 264. And see *Doe* d. *Stutsbury*, *ux et al.* v. *Smith et ux.* 1 *Esp. R.* 391. *Dyrell* v. *Glasscock*, *Skinn. R.* 413. If the opposite party disputes the regularity of the execution, *he* may call any of the other witnesses; but a devisee will not be obliged to call the rest, if one alone can prove the execution, *viz.* that the testator signed in the presence of himself and two other witnesses, or that he acknowledged his signing to each of them; or that another person signed in testator's presence, and by his express direction, and in the presence of himself and two other witnesses, and that each of the witnesses subscribed in his presence. But if the witness who is called can only prove his own share in the transaction (as must happen where the testator acknowledged his signing to the witnesses separately), the other witnesses ought, in that case, to be called. If they are dead or insane, their hand-writing, and that of the testator, ought to be proved. *Croft* v. *Paulet* (in text, *page* 250. and cases in note there). It will then be a question for the jury, whether under the circumstances it is probable that all the requisites of the statute were regularly observed. See *Phillipps on Ev.* 3d ed. 434. 439. And the rule in equity, as to this last point, is the same. *Bennet* v. *Taylor*, *E.* 1804, 9 *Ves.* 381. See *Carrington* v. *Payne*, 5 *Ves.* 404. *Powell* v. *Cleaver*, 2 *Bro. C. C.* 499.

But the general rule *in chancery*, in order to prove a will of land, is, in all cases to examine *all* the subscribing witnesses. See the cases in the text, and *Hudson* v. *Kersey*, *supra*, 102. *Ogle* v. *Cook*, 1 *Ves.* 177. *Townsend* v. *Ivey*, 1 *Wils. R.* 216. S. P. And this is the rule even on the trial of an issue sent by that court to be tried at law. *Bootle* v. *Blundell*, 1 *Coop. Ch. C.* 136. But see *Carrington* v. *Payne*, *infra*, 260. *n.*

estate sold for the payment of their legacies, which were charged thereupon against the heir at law of the testator, who is an infant, and to have the will established. There were three witnesses to the will, all now living; but only one has been examined, who proved the execution of it, and the attestation of the other two witnesses. But Fortescue master of the rolls refused to establish the will, without the examination of all the witnesses; for it is a
[250] rule, that all the witnesses, if living, must be examined to prove the will: Besides, the heir at law is, in this case, an infant; who, if of age, has a right to cross-examine all the witnesses. And as no admission of this sort can be received for an infant, this court must protect his right, and therefore must insist upon all those requisites which he would have a right to insist upon if he were of age, and capable of making a defence for himself. 1 *Wilson*, 216.

So in *Ogle* and *Cook*, Dec. 10. 1748: Upon a bill for establishment of a will and performance of the trust, it was objected, that only two of the witnesses to the will were examined, and some account ought to be given why the third was not, as that he could not be found, or the like. Lord Hardwicke held it necessary to the establishment of a will; for if after the decree, the heir at law should controvert it, the court would order an injunction: nor did he care to make a precedent to the contrary; for if this other witness were called, he might say something material against it: and therefore ordered it to stand over till the third was examined. 1 *Ves.* 177. (4)

E. 12 *G.* 2. *Croft* and *Paulet.* On a trial at bar in ejectment, the defendant made title under a will, the attestation of which was in these words, *signed, sealed, published, and declared as and for his last will and testament, in the presence of us,* A., B., *and* C. The will was in 1723, and the witnesses were all dead, and their hands proved in common form. But then it was objected, that this was not an execution according to the statute; and the hands of the witnesses could only stand as to the facts they had subscribed to, and signing in the presence of the testator was not one. But the court, on the authority of a case in the common pleas, said it was evidence to be left to a jury of a compliance with all circumstances. And a verdict was given for the will. *Str.* 1109. (5)

Generally, by the civil law, the testimony of two witnesses is required; and if in the probate of a will the testimony of one witness is disallowed in the ecclesiastical court, a prohibition

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(4) And see the cases *ante*, pp. 77. 80., and notes there, to shew that all the three witnesses required by the statute of frauds, may subscribe a will at several times.

(5) S. P. *Hands* v. *James*, 2 *Com. Rep.* 530. *Brice* v. *Smith*, *Willes' Rep.* 1. S. P.

lieth not: for that court having jurisdiction of the matter, hath it also as to the manner of proof and proceedings. 2 *Roll's Abr.* 300.

But Dr. Godolphin says, where there is no controversy or dispute touching the will, there the single oath of the executor alone is sufficient for the probate thereof in common form. *God. O. L.* 65.

And this, it is said, is the practice throughout the province of Canterbury. But within the province of York, it hath been usual (though now discontinued in some of the dioceses) to swear also one witness to the will. [251]

When the testament is to be proved in *form of law*, it is requisite that such persons as have interest, that is to say, the widow and next of kin to the deceased, to whom the administration of his goods ought to be committed if he had died intestate, are to be cited to be present at the probation and approbation of the testament; in whose presence the will is to be exhibited to the judge, and petition to be made by the party which preferreth the will, and enacted for the receiving, swearing, and examining of the witnesses upon the same, and for the publishing or confirming thereof: whereupon witnesses are received and sworn accordingly, and are examined every one of them secretly and severally, not only upon the allegation or articles made by the party producing them, but also upon interrogations ministered by the adverse party, and their depositions committed to writing; afterwards the same are published; and in case the proof be sufficient, the judge doth by his sentence or decree pronounce for the validity of the testament. *Swin.* 448, 449. (6)

Which difference of form in proving the will, worketh this diversity of effect; namely, that the executor of the will proved in the absence of them which have interest, may be compelled to prove the same again in due form of law; and if the witnesses be dead in the mean time, it may endanger the whole testament, especially if ten years be not past since the probation, whereby necessary solemnities are presumed to have been observed; whereas the testament being proved in form of law, the executor is not to be compelled to prove the same any more; and although all the witnesses afterwards be dead, the testament doth still retain its full force. *Swin.* 449.

But probably this word *ten* in figures may have been mistaken for *thirty*; for Dr. Godolphin says, The will being proved only in common form, it may be questioned at any time within thirty years next after, by common opinion, before it work prescription. *God. O. L.* 62.

And this proving of the will in solemn form is for the most part at the instance of some person who desireth to invalidate

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(6) Thus the court cannot declare a will well proved, where an heir at law is not to be found. *French* v. *Baron*, 2 *Atk. R.* 120.

the same(7); in which case, his proctor, at the time of exhibiting the will, ought to accept the contents thereof so far forth as it maketh for the benefit of his client; otherwise if any legacy is given to him, in the will, he shall lose it for his general impugning of the will. 1 *Ought*. 21.

[252] And in such case, where an executor hath been called to prove the will by witnesses, and hath fully proved it; if the party who caused him to do this shall not, after publishing the attestation, except against the will or the witnesses, nor propose any matter to hinder the passing of sentence for the validity of the will, the judge doth not usually condemn him in costs: but otherwise it is, if he shall propose such matter and fail in the proof; for then he will be condemned in costs, at least from the time of such proposal. 1 *Ought*. 20.

But where the parties interested do not call the executor to prove the will in solemn form, yet the executor himself may cause the will to be proved in this manner: As where an executor hath the greatest part of the goods of the deceased bequeathed unto himself, and he doubteth, after the witnesses shall be dead, that the wife or children or other kindred of the deceased will contest the validity of the will, he may cite them in special, (and all others pretending interest in general, and so is the usual practice,) to see the will proved by the witnesses; which being done, the will shall not be set aside afterwards (provided there hath been no irregularity in the process) when the witnesses are dead. 1 *Ought*. 20.

Where the executor is infirm, or lives at a great distance, it is usual to grant a commission to some grave clergyman in the neighbourhood, to administer the oaths, and perform the other requisites for granting probate of the will. So also in the granting of administrations. 1 *Ought*. 322. (8)

Disputed wills. (7) No person can take by a will, and at the same time, do any thing that shall destroy it. *Morris* v. *Burrows*, 2 *Atk*. 629.; and a claimant under a will must admit it *in toto*. *Allen* v. *Poulton*, 1 *Ves*. 122. Disputed wills ought to be lodged in the registry of the court, for safe custody. *Cunningham* v. *Seymour*, 2 *Phill. Rep*. 250. A proctor for executors who has admitted the interest of a party opposing the will, cannot retract his admission and put the party to proof of his interest. *Panchard* v. *Weger*, 1 *Phill. Rep*. 212. Next of kin barred from calling in a probate by the circumstance of their having been conusant of a prior suit, in which the validity of the same will had been contested by other parties. *Newell and King* v. *Weeks*, 2 *Phill. Rep*. 224.

(8) The commission to take affidavits of executors to the will of a deceased is addressed to two clergymen, and directs the executors to be sworn in presence of a notary public; it must be executed before such a notary, and not before two witnesses. *Jones* v. *Jones*, 2 *Phill. Rep*. 241.

Besides these forms of proving testaments above recited, which are referred to that kind of probation which is called the publication of the testament; there is yet another form which is called the *opening* of the testament, which form doth respect written or closed testaments, in the making whereof the civil law did require that the witnesses should put to their seals: and after the death of the testator, at the opening of the written or closed testament, the same law did also require that the same witnesses should be called by the magistrate to acknowledge their seals, or to deny the sealing. But as we do not observe that solemnity of the civil law in the sealing of the testaments by the witnesses; no more do we observe that solemnity which the civil law requireth in opening of testaments sealed; unless this may seem to have some resemblance with this third form about the opening of the testament, which is enacted by the *statute* 21 *H.* 8. *c.* 5., which saith, that the bishop, ordinary, or other [253] person having authority to take probate of testaments, shall, upon the delivery of the seal and sign of the testator, cause the same seal to be defaced, and thereupon incontinent redeliver the same seal unto the executor or executors, without claim or challenge thereunto to be made. § 5. *Swin.* 450.

Dr. *Swinburne* says, if a testament be made in writing, and afterwards be lost by some casualty; yet if there be two witnesses [that is, in the case of goods and chattels] which did see and read the testament written, and do remember the contents thereof, these two witnesses so deposing of the tenor of the will, are sufficient for the proof thereof in form of law: so that they be otherwise as well in respect of their skill as of their integrity, greater than all exception, and specially some other likelihoods concurring therewithal to make their testimony more credible. *Swin.* 450 (9)

If an executor proves a will of a personal estate, wherein one of the legacies is forged, the executor in such case hath no remedy in equity; but ought to have proved the will, with special reservation to that legacy. *Plume* and *Beale*, 1 *Peere W.* 388. 2 *Vern.* 8. 17. In which case, the forgeries are to be decreed against in the ecclesiastical court, and the will engrossed without them, and so annexed to the probate.

[Refusing probate to part.]

[Will may be in part established, and probate refused to another part: so reference to another will will make it operative as far as its contents can be applicable. (1)

(9) When a will is not found on the death of a testator, the presumption of law is, that it has been destroyed by him. *Loxley* v. *Jackson*, 3 *Phill. Rep.* 126.

(1) *Wood* v. *Wood*, 1 *Phill. Rep.* 357—374. And see 1 *Phill. Rep.* 187. *ante*, 59 *a. note.*

A bequest of residue, omitted, through the error or inadvertence of the solicitor, to be inserted in a testamentary instrument, was not admitted to probate. (2)

[Calling in probate.] Probate in common form of certain "instructions," as containing the last will of the deceased, having been granted on a special affidavit, was called in eight years after, and the executors put on proof of the will. This step being held to be taken by the next of kin on insufficient grounds, the instructions were pronounced for, and next of kin condemned in costs from the time of giving in their allegation. (3)

Probate of a codicil written in pencil, and which had been upwards of three years in possession of the executor, was called in and revoked. (4)]

Executor's oath to render a just account. 18. By a constitution of archbishop *Stratford*: After the testament shall be proved according to custom before the ordinary, the execution or administration of any goods shall not be committed, but to such as *shall faithfully promise* to render a just account of their administration, when they shall be thereunto duly required by the ordinary. *Lind.* 177.

Shall faithfully promise] And that by oath, saith *Linwood*, which may be before the administration. *Lind.* 177.

And *Swinburne* says, in what manner soever the testament be proved, the executor, before he be admitted by the ordinary to execute, and before he have the will under the seal of the ordinary, is to promise by virtue of his oath, to make a true account when he shall be thereunto lawfully called by the ordinary. *Swin.* 451.

By the ancient canon law, a proctor having a special proxy might make oath instead of the executor or administrator, and swear upon the soul of his client; but now, by *canon* 132., *it is ordained*, that forasmuch as in the probate of testaments and suits for administration of the goods of persons dying intestate, the oath usually taken by proctors of courts *in animam constituentis*
[254] is found to be inconvenient: therefore from henceforth every executor or suitor for administration shall personally repair to the judge in that behalf or his surrogate, and in his own person (and not by proctor) take the oath accustomed in these cases. But if by reason of sickness, or age, or any other just let or impediment, he be not able to make his personal appearance before the judge; it shall be lawful for the judge (there being faith first made by a credible person of the truth of his said hinderance or impediment) to grant a commission to some grave ecclesiastical person, abiding near the party aforesaid, whereby

(2) *Rockell* v. *Youde*, 3 *Phill. Rep.* 141.
(3) *Evans* v. *Knight and Moore*, 1 *Add. Rep.* 229.
(4) *Rymer* v. *Clarkson*, 1 *Phill. Rep.* 22.

he shall give power and authority to the said ecclesiastical person, in his stead to minister the accustomed oath above mentioned to the executor or suitor for such administration, requiring his said substitute, that by a faithful and trusty messenger he certify the said judge truly and faithfully what he hath done therein.

Which oath, to be administered to the executor, is usually in this form: "You shall swear, that you believe this to be the "true last will and testament of *A. B.* deceased; that you will "pay all the debts and legacies of the deceased, as far as the "goods shall extend, and the law shall bind you; and that you "will exhibit a true, full, and perfect inventory of all and every "the goods, rights, and credits of the deceased, together with "a just and true account, into the registry of the —— court "of —— when you shall be lawfully called thereunto. So help "you God."

19. By the same constitution of archbishop *Stratford*. After the testament shall be proved according to custom before the ordinary, the execution or administration of any goods shall not be committed but to such as are able; and if need be, shall give sufficient security to render a just account of their administration, when they shall be thereunto duly required by the ordinary. *Lind.* 177.

Bond to the like purpose.

And *Lindwood* hereupon observeth, that it seemeth hereby that the ordinary may remove the executor appointed by the testator from the administration, especially where there is just cause, as where he cannot give security for a due account. *Lind.* 177.

And *Swinburne* says, the executor (if it be behoveful) shall enter into bond, to make a true account when he shall be thereunto lawfully called by the ordinary. *Swin.* 451.

But in the case of *The King* and *Sir Richard Raines, M.* 10 *W.*, a mandamus was directed to sir Richard Raines to command [255] him to grant probate of the will of Edith Pinfold to one Richard Watts, who was made executor of it. Sir Richard Raines makes return to it, and admits that Edith Pinfold made her will, and Watts executor of it; but says further, that it clearly and judicially was proved and appeareth to him that Watts is worth nothing, but absconds for debt; and therefore that it is lawful to him to defer the granting of the probate, until Watts find sufficient security to perform the intent of the will. And it was argued by sir *Bartholomew Shower*, Mr. *Montague*, and Dr. *Waller*, the king's advocate general, (a civilian), that this return was good, and that a peremptory mandamus ought not to be granted. And Dr. *Waller* said, that in fact the case was thus: Edith Pinfold made her will, and Richard Watts, her nephew, her executor, and devised to him 100*l.* for a legacy, and some cattle; she devised also to Baines, her brother, 500*l.*, and the

residue of her personal estate to the son of Baines. The will was brought by Baines to the prerogative court to be proved; and it was opposed by one Huntley; but the cause was not promoted at all by Watts. Sentence passed in the prerogative court for Baines; upon which Huntley appealed to the delegates, and the sentence there was confirmed; whereupon the will was returned into the prerogative court, and then Watts claimed probate: but upon examination it appeared to the judge, that he was an insolvent and necessitous man, and had received his legacy, and therefore the judge required caution; upon which Watts obtained this mandamus, and to it the judge made this return, which (by Dr. *Waller*) is good: For if there is any default in the judge in the administration of his office, it is a proper subject for an appeal: for this will, being of chattels, is altogether of ecclesiastical cognizance: and therefore as the spiritual judge shall determine concerning the validity of the will, so he ought to make a judgment, whether he ought to grant probate of it or administration, or if the executorship be conditional, as it may be, whether the condition be performed, or the like: in all which cases, if he makes a false judgment, the proper remedy is by appeal, and not to come in this manner for remedy to the king's bench. He argued further, that the judge hath done nothing in this case but what he ought to do; for in such cases he may properly require caution. In the time of the heathen emperors, the testaments were reposed in the colleges of the *pontifices;* and
[256] from the time that the emperors became christian, the bishops were intrusted with them. Now the civil law was, that security should not be demanded *de hærede*, which at that time included what we now call executor, unless he was insolvent; and then it was lawful to demand caution or security. But after this, the canon law followed: and then they made use of the word executor, which was before included in the word heir: and of them there are three sorts; first, *legitimus*, to wit, the ordinary; secondly, *datus*, namely, he whom the ordinary appoints, and he always gives security; thirdly, *testamentarius*, who came instead of the heir, which is he whom we call executor by way of pre-eminence. And then, as the heir before, if he was insolvent, always gave caution; so, for the same reason, an insolvent executor always gives caution. To say the truth, there is a difference made, when the testator knew at the time of the making his will that the person whom he constituted executor was then insolvent, and when the executor is become insolvent by matter *ex post facto;* but at what time Watts became insolvent doth not appear in this case; and therefore to justify the acting of a judge, the court will intend, if it be material, that he became insolvent since the death of the testatrix, rather than at the time of the will made. In *Lind.* 167. it is said that no religious person shall be

executor, unless his superior takes care to give caution for the due execution of the will, and for the loss that may happen by his administration; and *Lindwood* gives the reason of it, because it appears that such a person is insolvent; which proves that insolvent persons ought to give caution. So *Lind.* 177., before the executor be admitted by the ordinary to execute the will, he ought to take an oath (which is the constant practice, and yet no mention is found of such oath, before that which these constitutions in *Lindwood* make of it; and yet before the late statute, if quakers refused to take such oath, no probate of any will used to be granted to them) — and *if need be*, says *Lindwood*, he shall give sufficient caution. To the same purpose *Swinburne* says, that the executor, if it be behoveful, shall enter into bond. To which sir *Bartholomew Shower* added, that if an executor is *non compos*, the ordinary is not bound to grant probate to him; because he hath an apparent disability to execute the will; which strongly resembles this present case. Also, he said, that if the executor refuses to take the oath, this amounts to a refusal of the office, and the ordinary may grant administration with the will annexed. Why then shall not the refusal to give security amount [257] to a refusal of the office of executor; since there is no positive law, that in such case the ordinary shall administer an oath, more than in this case that he shall demand caution? Further, he said, that although mandamuses are granted oftentimes to compel the granting of administration, because they are founded upon the act of parliament which appoints the granting of administrations; yet one cannot find any precedents of mandamus, to compel the judges at the civil law to execute their law, which seems to be the present case. — Against this it was argued by Mr. *Northey* and Mr. *Eyre*, that the prerogative court cannot in such case require caution, for the same reasons that the court afterwards gave for the ground of their judgment, and therefore unnecessary to be repeated. — And by *Holt* chief justice: Wills and testaments are of ecclesiastical cognizance, not by force of the civil or canon laws (for they bind no farther here, than as they have been received here), but by the law of the land. Then if the ecclesiastical courts proceed to enlarge the power of the judge, contrary to that which the common law allows, the king's bench will prevent all sorts of encroachments. As if an executor be sued in the ecclesiastical courts to make distribution, he not being residuary legatee; though that were allowed by the canon law, yet the king's bench would want a prohibition to stay any such suit; for all suits for distribution were prohibited by the king's bench, until the statute of the 22 & 23 *C.* 2. *c.* 10. made them lawful. Dr. *Waller* has not quoted any canon law, that the ordinary in such case ought to take caution: and the com-

mon law will not permit him to exact security, for the insolvency of the executor. For suppose in this case (as the fact is) the executor will not give security, and yet will not renounce the executorship; the ordinary cannot compel him to give security. What must be done? Though a refusal of the oath amounts to a refusal of the office of executor (because the oath is allowed by the common law, for it is proper to take a promissory oath, that he will execute the office justly, which he is going to execute), yet the refusal to give security will not amount to a refusal of the office of executor; because it is against common right, to require collateral security. Then the testament will continue in force; the ordinary cannot grant administration with the will annexed: and so there will be a failure of justice, nobody being capable
[258] to sue the testator's creditors. One half of what one finds in *Lindwood* is not the law of the land. And as to the case of religious persons, objected out of *Lindwood*, he said, that if a monk be made an executor, he cannot accept the office without leave of his superior; and then if the superior gives him leave to be executor, without giving other collateral security, the superior by his leave given is become surety: and if the monk commits a *devastavit*, the suit shall be against the abbot and the monk, and the execution will be of the goods of the house. And *Turton* justice agreed with *Holt* chief justice in every thing. But *Rokeby* justice seemed to be of opinion, that the grievance in the present case would be properly remedied by appeal. And he said that in the province of York security was always given upon the granting of the probate of a will, without any dispute made about it. Upon which a day was given to Dr. Waller, to certify the king's bench, by producing precedents, whether the practice had been in the prerogative court to take caution in such case. At which day no precedent of it being shewn, nor satisfaction thereof given to the court, *Holt* chief justice, with the concurrence of the other judges, pronounced the opinion of the court, that a peremptory mandamus ought to be granted in this case; because the ecclesiastical court cannot require caution in this case: 1. For when a man is made executor, nobody can add qualifications to him, other than those which the testator has imposed; but he shall be who, and in what manner, the testator shall judge proper. 2. The executor has a temporal right of which he is barred by the refusal of the probate, inasmuch as he cannot before probate sue in Westminster-hall. 3. There are no precedents in the canon law to warrant this; and the practice has been always contrary. And if any cases happen, in which equity may be requisite, there is another channel here where it runs, without resorting to the spiritual court, namely, the chancery. And a peremptory mandamus was granted.—And the

reporter says, Mr. Robert *Eyre* told him, that the lord chancellor *Somers* well approved of this resolution. *L. Raym.* 361. (5)

But after all, this adjudication proceeds upon a supposition, that there is no canon law which requireth such caution, and *Lindwood's* authority alone was not judged sufficient in this case. [259] But the aforesaid constitution of archbishop *Stratford* is, undoubtedly a part of the canon law, which requires, that *they shall give sufficient security, if need be.* In the province of York, bond hath been usually given. But perhaps this might arise from the custom within that province, which continued down until the fourth year of king William, of reserving out of the effects of the deceased a rateable part for the wife and children, which the testator could not dispose of by will; and consequently, as to so much, it was an intestacy, which in some cases amounted to one-half, in others to two-thirds, of the whole personal estate.

And in the case of *Folkes* and *Dominique*, *T.* 13 *G.* 2., where the executor was under the age of 17 years, the court allowed a bond [for due administration] given by the administrator with the will annexed, during the minority of the executor, to be good at common law, and not obtained by coercion. *Str.* 1137. (*i*)

Probate making out.

20. All this being done, the bishop's officers are to keep the will original, and certify the copy thereof in parchment under the bishop's seal of office; which parchment so sealed is called the will proved. *Bacon's Use of the L.* 160. (*k*)

Register of wills in particular places.

21. By the 2 & 3 *An. c.* 4. In order to render it more easy for the clothiers and others to borrow money upon land security for the promotion of trade, it is enacted, that a memorial of all wills and devises in writing, whereby any honours, manors, lands, tenements, and hereditaments within the *West Riding* of

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(5) [S. C. 1 *Salk.* 299. *Stra.* 672. It is no ingredient to take assets out of the hands of an executor, that he is not of an affluent fortune; for the testator did not regard his circumstances when he reposed his confidence in him. *Hathornthwaite* v. *Russell*, 1740, 2 *Atk.* 126. *Barn.* 334. Nor will the court appoint a receiver merely because an executor is in mean circumstances — *secus* on his misconduct. *Anon.* *H.* 1806, 12 *Ves.* 4. And see *Powis* v. *Andrews*, 2 *Bro. P. C.* 476. *Taylor* v. *Allen*, 2 *Atk.* 213. *Morgan* v. *Harris*, 2 *Bro. C. C.* 121. *Brown* v. *Dunbridge*, *id.* 321.]

(*i*) See *The King* v. *Sir Edw. Simpson*, 3 *Burr.* 1463. 1 *Bla. Rep.* 456. *et supra*, 10. That the court of chancery considers an executor as a *trustee*, and if insolvent will compel him to give security before he enters upon the trust, or appoint a receiver, *vide supra*, *Form and manner*, 9.

(*k*) And the probate being obtained is conclusive as to the character of an executor. *Griffiths* v. *Hamilton*, 12 *Ves.* 298.

the county of *York*, may be any way affected in law or equity, may at the election of the party or parties concerned, be registered in such manner as by the said act is directed: and every devise by will of the honours, manors, lands, tenements, or hereditaments, or any part thereof, contained in any memorial so registered as aforesaid, that shall be made and published after the registering of such memorial, shall be adjudged fraudulent and void against any subsequent purchaser or mortgagee for valuable consideration; unless a memorial of such will be re-
[260] gistered as aforesaid. But this not to extend to copyhold estates, nor to leases at rack rent, nor to any lease not exceeding twenty-one years where possession goeth along with it.

By the 5 *An. c.* 18. There are some further regulations concerning the same.

The statute of the 6 *An. c.* 35. containeth regulations to the like purposes for the *East Riding* of the said county of *York*: Which same regulations are also extended to the *West Riding*, in aid of the two former acts.

By the 7 *An. c.* 20. The like for the county of *Middlesex*.

By the 8 *G.* 2. *c.* 6. The like for the *North Riding* of the said county of *York*.

And by the 25 *G.* 2. *c.* 4. Further regulations with respect to the county of *Middlesex*.

Probate of a will of lands, not evidence.

22. The probate of a will, or a copy of the will out of the register of the spiritual court, are not to be allowed as evidence in the case of lands. *Dike* and *Polhil*, *L. Raym.* 744. (6)

[Custody of wills.]

H. 7 *G.* 2. *Morse* against *Roach and others*. In the chancery. Before the year 1718, the method was to deliver out a will of land to be proved at trials, or on commissions, upon security. Since that, the registers have refused to deliver out the will, but insist upon being paid for attending with it: and where it was wanted at a distance, their demands did run very high. In this case an order was made (upon producing three precedents) that it should be delivered out on security; it being a bill brought by creditors and legatees, who were not likely to suppress it. *Str.* 961.

Nov. 23, 1738, *Frederick* and *Aynscombe*. A will was executed at Bullogne, and proved here in common form, and deposited in the prerogative court of Canterbury. One of the witnesses resided at Bullogne. On a bill brought to perpetuate the testimony to the said will, it was moved, that the register of the prerogative court, or the record-keeper, might be ordered to deliver out to the defendant the original will, on his giving a

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(6) S. P. *Bull. N. P.* 245. Even though the original is proved to be lost. *Doe* d. *Ash* v. *Calvert*, 2 *Campb.* 389. *Hoe* v. *Nathrop*, 1 *Ld. Raym.* 154. *St. Leger* v. *Adams*, *id.* 731.

reasonable security to return the same, after the examination of the witness at Bullogne. And it was directed by the lord chancellor *Hardwicke*, that the defendant should be at liberty to take out a commission to examine his witness at Bullogne; and it appearing that the defendant was the only devisee who could claim any real estate under the will, he ordered the will to be delivered out by the proper officer to a person to be named by [261] the defendant, on his giving security to be approved of by the prerogative court to return the will in three months. He said, if the defendant had not been the sole devisee of the real estate, but there had been other persons under the will interested in it, and they had refused their consent, he would not have made this order; because the taking a will out of the kingdom is different from any former cases, they having gone no further than ordering them to different parts of England. 1 *Atkyns*, 627. (7)

Probate of a will of goods and chattels, how far evidence.

23. The seal of the ecclesiastical court (as to goods and chattels) doth authenticate the will, and is not to be contradicted; because as there is no way in the temporal courts to prove the will relating to chattels, it must go on in the spiritual court, and the determination must there be final. (*l*) For the temporal

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(7) See *Williams* v. *Floyer*, *Amb. Rep.* 343. *Lake* v. *Causefield*, 3 *Bro. C. C.* 260. S. P. One of the subscribing witnesses to a will of real estate being in Jamaica, the court dispensed with his evidence. *Lord Carrington* v. *Payne*, 5 *Ves.* 404.

(*l*) During the existence of a probate, which is a judicial act of the ecclesiastical court, the courts of common law cannot admit evidence to impeach it, having no jurisdiction upon the subject: and therefore though the will be forged, and the probate afterwards revoked by the court that granted it, payment of money to the executor, while the probate was unimpeached, shall discharge the debtor, he being bound by the judicial act of a court having competent authority. *Allen* v. *Dundas*, 3 *T. Rep.* 125. [See *ante*, 239. *note* by the editor.] But the jurisdiction of the ecclesiastical court commences only upon the death of the testator; and therefore if a probate of a forged will be procured during the lifetime of the supposed testator, it is a mere nullity, and need not be revoked, though the person forging it may be indicted for forgery. See *Cogan*'s case, in *Leach's Crown Law*, and *St. Tr.*, *Duch. of Kingston*'s case. Relief in equity was, however, given in one case, *viz.* *Barnsley* v. *Powel*, *supra*, 7.; where the will appearing to have been forged, and the probate to have been obtained by a fraud on the plaintiff in procuring his consent to it, lord *Hardwicke* C. decreed that the defendant should consent to a revocation. [And in *Sinclair* v. *Hone*, *H.* 1802, 6 *Ves.* 607., where the ecclesiastical court granted probate to a codicil, which, under the circumstances, the court of chancery held to be ineffectual, the latter court held that that probate should not be considered conclusive (unless in a very plain case); *for that court cannot decide on the question before they grant probate.*]

court cannot make a judgment concerning the will, contrary to what was made in the ecclesiastical court; and therefore if a probate is shewn under the seal of the ordinary, they cannot give in evidence that the will was forged, or that another person was executor, but they may give in evidence, that the seal was forged, or that there were *bona notabilia*, because it is not in contradiction to the real seal of the courts, but it admits the seal, and avoids it. And since the ecclesiastical court hath now the probate of wills settled by custom, the temporal court cannot prohibit them in their inquiries whether the testator was *compos*
[262] *mentis* or not, or whether the will be revoked or not, because that is necessary for authenticating the will. *Str.* 671, 672.

And by *Holt* chief justice: The judge of the spiritual court is the only proper judge to determine the validity of wills for things personal, and therefore the probate is undeniable evidence to a jury; and he said he remembered a case in the time of lord chief justice *Kelyng*, where an executor brought an action, and at the trial produced the probate, and the defendant's counsel offered to prove, that the supposed testator died intestate; but *Kelyng* chief justice told them that the probate was evidence uncontrovertible; and with him concurred the other judges, and so it hath been always held since. *L. Raym.* 262.

But yet it is held that if the probate of wills and granting administrations be traversed or denied in the king's courts, and issue joined, that the ordinary did not commit administration to such a one, or that the testament is not proved before the ordinary, or that he whose will is proved before the ordinary died intestate, or that he of whose goods administration is granted as of one intestate made a will; in these and the like cases it is held, that certificate shall not be made by the ordinary, but that it shall be tried by jury: and the reason given for it is, that probate of wills, and granting administration, originally did not belong to the ecclesiastical cognizance, but were given to them of later times; and that therefore nothing but the probate and granting administration, which were given to them, doth appertain to their jurisdiction; but the *trial* thereof is not given to them, but is left to the trial of the common law. *Gibs.* 468. 9 *Co.* 40. (8)

But before this time (in the 31 *El.*) in case of refusal or no refusal, how it should be tried; this distinction was laid down: where the issue is, whether the executor did refuse before such a day, or after, there the trial shall be by jury; contrary, where the issue is, upon refusal generally; because the refusal is before

(8) Thus in *Colman* v. *Sarrell*, 1 *Ves. jun.* 54., probate of a will in the ecclesiastical court is sufficient as far as it goes: *for further proof, if necessary, may be proceeded on in the court of chancery.*

the ordinary as a judge. And the case then before the court being this, "That the bishop certified that he did not refuse; whereas "in truth he had refused before the commissary:" the court held, that they could not write to the commissary, since the bishop, and not he, was the officer unto the court to that purpose, and that the party could not aver against the certificate of the bishop any more than against the return of the sheriffs. *Gibs.* 468.

M. 8 *G. The King* against *Vincent and others.* Indictment for forging a will relating to a personal estate; and on the trial a forgery was proved: but the defendants producing a probate, that was held to be conclusive evidence in support of the will. *Str.* 481. (9) [263]

T. 12 *G. The King* v. *Rhodes.* The defendant exhibited a will in doctor's commons as executor, and demanded probate. After a long contest there, it was determined in favour of the will; and upon appeal to the delegates, the sentence was confirmed. Afterwards the parties who had been concerned in cooking up the will, fell out amongst themselves about the division of the estate; and thereupon it came out that the will was forged; and upon full affidavits of the forgery, a commission of review (which it was agreed was the only method to bring the matter over again) was granted by the lords justices; and an indictment was also found for the forgery, and stood ready for trial in the king's bench. Upon motion for a *habeas corpus ad testificandum*, *Raymond* chief justice declared, that he would not try the cause. For there being yet a sentence subsisting in favour of the will, and the validity of that being now put under a proper examination; he did not think it fitting to determine the property by an indictment which would come on more properly after the sentence was reversed. *Str.* 703. (*m*)

In the case of *St. Leger* and *Adams*, *Holt* chief justice said, without doubt the register's book in the spiritual court is good evidence to prove that there was a will, although it be lost. *L. Raym.* 731.

And in the case of *Shepherd* and *Shorthose*, *H.* 7 *G.* Where the probate is lost, an exemplification of it from the act of the spiritual court hath been allowed as evidence of the will being proved. *Str.* 412.

H. 8 *W. Hoe* and *Nelthorpe.* It was held by *Holt* chief jus-

(9) This case is overruled in *The King* v. *Gibson.* See *ante*, 238. *note* (8).

(*m*) [But see *ante*, 238. *note* (8).] In *Goodrich*'s case at the Old Bailey, in 1784, it was the opinion of the judges that the trial for forgery should be postponed till the ecclesiastical court had determined upon the validity of the probate. Cited in 3 *T. Rep.* 126. See also *Gilb. Eq. Cas.* 207, 208. *Palm.* 163.

tice, that the copy of the probate of a will is good evidence, where the will itself is of chattels, for there the probate is an original taken by authority, and of a public nature; otherwise,
[264] where the will is of things in the realty; because in such case the ecclesiastical courts have no authority to take probates, therefore such probate is but a copy, and a copy of it is no more than the copy of a copy. 3 *Salk.* 154.

By the statute of the 4 *An. c.* 16. intitled, "An act for the amendment of the law and the better advancemment of justice," no advantage or exception shall be taken of or for the default of alleging the bringing into court letters testamentary; but the court shall give judgment according to the very right of the cause, without regarding any such imperfections, omissions, and defect, or any other matter of like nature, except the same shall be specially and particularly set down and shewn for cause of demurrer.

Fee for probate.

24. By the 31 *Ed.* 3. *st.* 1. *c.* 4. Whereas the ministers of bishops and other ordinaries of holy church take of the people grievous and outrageous fines for the probate of testaments, and for the making of acquittances thereof; the king hath charged the archbishop of Canterbury and the other bishops, that they cause the same to be amended; and if they do not, it is accorded that the king shall cause to be inquired by his justices of such oppressions and extortions, to hear them and determine them, as well at the king's suit, as at the suit of the party, as in old time hath been used.

By a constitution of archbishop *Mepham:* For the insinuation of the testament of a poor person, the inventory of whose goods shall not exceed 100*s*., nothing shall be demanded. *Lind.* 170.

And by a constitution of archbishop *Stratford:* We ordain that for the *probation*, or *approbation*, or *insinuation* of any testaments whatsoever, nothing at all shall be taken by the bishops or other ordinaries: but we permit 6*d*. and no more to be taken by clerks writing such insinuations, *for their labour.* But if the inventory of the goods of any person deceased *do exceed the sum of* 30*s. in the computation*, and do not extend to 100*s*.; the bishops or ordinaries, or persons deputed by them, and auditing the accounts, or other ministers assisting them in the auditing of such accounts, shall not take for the account, and doing all things concerning the same, and letters of acquittance, or other letters whatsoever, above 2*d*. And if the inventories contain the sum of 100*s*. or more, and less than 20*l*.; they shall not take above 3*s*. But if they contain the sum of 20*l*. or more, and less than 60*l*.; they shall not take above 5*s*. If they contain the sum of 60*l*. or upwards, and less than 100*l*.; they shall have 10*s*. and no more. If they contain the sum of 100*l*. or more, and less than 150*l*.; they shall not take above 20*s*. And so for

every 50*l.* further, they shall take, besides the said sum of 20*s.*, the sum of 10*s.* and no more. But we permit the clerks for every letter of acquittance which they shall write in this behalf, to take 6*d.* above the premises for their labour. And if any person in any the cases aforesaid shall take above the sum before ordained, in money or other things, he shall pay double within a month to the fabric of the cathedral church. And bishops neglecting to pay the same within the time limited, shall be prohibited *ab ingressu ecclesiæ;* and the other inferiors neglecting the same as aforesaid, shall be suspended *ab officio et beneficio,* until they shall pay the same.

Probation] That is, taking the proofs. *Lind.* 181.

Approbation] That is, the decree for the validity of the testament. *Lind.* 181.

Insinuation] That is, publication thereof amongst the acts of the judge. *Lind.* 181.

Do exceed the sum of 30s. in the computation] *Lindwood* seems to resent this constitution, as arbitrary and unreasonable; and observes, that the officers of the court were left at liberty to demand what they would, when the inventory was under 30*s.* *Lind.* 181.

For their labour] But if it shall happen that witnesses are to be examined, and their depositions to be taken in writing; it seemeth that for this they shall be rewarded besides, according to the quantity of their labour. And the same is to be understood, if the testament be long in writing; and it be to be registered, that then the register shall receive a reasonable satisfaction. *Lind.* 181.

By the 21 *H.* 8. *c.* 5. it is enacted, that nothing shall be demanded, received, nor taken, by any bishop, ordinary, archdeacon, chancellor, commissary, official, or any other person or persons who shall have power to take or receive probation, insinuation, or approbation of testament or testaments, by himself or themselves, nor by his or their registers, scribes, praisers, summoners, apparitors, or by any other of their ministers, for the probation, insinuation, and approbation of any testament or testaments, or for writing, sealing, praising, registering fines, making of inventories, and giving acquittances, *or for any other cause concerning the same,* where the goods of the testator or person so dying do not amount clearly over and above the value of 100*s.*, except only to the scribe to have for writing of the probate 6*d.*, and for the commission of administration of the goods of any man dying intestate, not being above the like value of 100*s.* clear, 6*d.*; and that nevertheless the bishop, ordinary, or other person having power to take the probation or approbation of testaments refuse not to approve any such testament, being lawfully tendered or offered to them to be proved or approved, so [266]
that such testament be exhibited to him or them in writing, with

wax thereunto affixed ready to be sealed, and that the same testament be lawfully proved before the same ordinary (before the sealing) to be true, whole, and the last testament of the same testator, in such form as hath been commonly accustomed in that behalf. 21 *H.* 8. *c.* 5. § 2.

And when the goods of the testator do amount over and above the clear value of 100*s.* and do not exceed the sum of 40*l.*, that then they shall not for the probation, insinuation, and approbation of any testament or testaments, or for the registering, sealing, writing, praising, making of inventories, giving of acquittances, fines, or any other thing concerning the same, take or cause to be taken of any person but only 3*s.* 6*d.* and not above; whereof to be to the bishop or ordinary, or other person having power to take the probation or approbation of such testament, for him and his ministers, 2*s.* 6*d.* and not above; and 12*d.* residue of the said 3*s.* 6*d.* to be to the scribe for registering the same. And where the goods of the testator, or person so dying, do amount above the clear value of 40*l.*, that then they shall not take for the probation, insinuation, and approbation, of any testament or testaments, or for the registering, sealing, writing, praising, making of inventories, fines, giving of acquittances, or any thing concerning the same probate of a testament, but only 5*s.* and not above; whereof to be to the said bishop, ordinary, or other person having power to take the probation of such testament, for him and his ministers 2*s.* 6*d.* and not above; and 2*s.* 6*d.* residue of the said 5*s.* to be to the scribe for registering the same; or else the same scribe to be at his liberty to refuse the 2*s.* 6*d.* and to have for writing of every ten lines of the same testament, whereof every line to contain ten inches, one penny. § 3.

And that every such bishop or ordinary, or other person having power to take probation of testaments as aforesaid, their registers, scribes, and ministers, shall approve, insinuate, seal, and register, from time to time, the said testament, and deliver the same, sealed with the seal of their office, to the executor or executors named in any such testaments, for the said sum or sums abovesaid, and in manner and form as is above rehearsed, with convenient speed, without any frustratory delay. § 4.

And if any person shall require a copy of the said testament so proved, or of the said inventories so made; that then the said ordinary, or other persons having authority to take probate of testaments, or their ministers, shall from time to time, with convenient speed, without any frustratory delay, deliver, or cause to be delivered, a true copy or copies of the same, to the
[267] said persons so demanding the same; taking for the search and for the making of the copy of either of the said testament or inventory but only such fee as is before rehearsed for the registering of the said testament; or else the scribe or register to be

at his election and liberty to have for every ten lines thereof, being of the proportion before rehearsed, one penny. 21 *H.* 8. *c.* 5. § 5.

Provided, that where any person or persons having power to take probate of testaments, have used to take less sums of money than is abovesaid, for the probation of testaments or commissions of administrations, or other cause concerning the same, they shall take and receive the same as before this act they have used to take, and not above. § 6.

And every bishop, ordinary, archdeacon, chancellor, commissary, official and other person having authority to take probate of testaments, their registers, scribes, praisers, summoners, apparitors, and all other their ministers, whatsoever they be, that shall do or attempt, or cause to be done or attempted, against this act in any thing, shall forfeit for every time so offending, to the party grieved in that behalf, so much money as any such person abovesaid shall take contrary to this present act; and over that shall forfeit 10*l.*, whereof one moiety shall be to the king, and the other moiety to the party grieved, that shall sue for the same in any of the king's courts; but that every of them which shall incur or fall into the danger of such penalty or forfeiture, shall be charged only for himself, and none of them to be chargeable to that penalty for other's offence. § 7.

§ 2. *Or for any other manner of cause concerning the same*] And it maketh no difference whether the probate be written upon the testament itself, or upon a transcript ingrossed; and in this latter case, if a greater fee be taken by the judge on account of ingrossing, this is within the prohibition of the statute, as was adjudged in the case of *Rouse* and *Real*, where the fee taken did amount to 4*s.* 10*d.*; and it was said, that if the executor required any to ingross the testament, he may agree with him whom he requireth to do it as he can; but the judge ought not to exact any fee on that account due to him. 4 *Inst.* 336. *Gibs.* 485.

Upon the whole, Dr. *Gibson* observes, that it is agreed on all hands, that the fees given by this act are become much too small, by the great alteration of the value of money, and the prices of things; and therefore now the rule is, the known and established custom of every place, being reasonable: which, as he hath been informed (he says), hath been adjudged a good rule. *Gibs.* 487.

By *Can.* 132. it is ordained, that no judge or register shall in anywise receive for the writing, drawing, or sealing of any such *commission* (as in the said canon before is mentioned), above the sum of 6*s.* 8*d.*, whereof one moiety to be for the judge, and the other for the register of the court. [268]

And by the statute of the 26 *H.* 8. *c.* 15. Forasmuch as

divers of the king's subjects inhabited within the archdeaconry of Richmond in the county of York, have been of long time sore and grievously exacted and impoverished by the parsons, vicars, and others, such as have benefices and spiritual promotions within the same, as by taking of every person when he dieth, in the name of a pension or of a portion, sometime the ninth part of all his goods, and sometime the third part, to their open impoverishment; it is enacted, that no manner of spiritual person or others who shall have any manner of benefice or other spiritual promotion within the said archdeaconry, shall in no wise ask, levy, demand, or take, after the decease of any person, any such portions or pensions, nor any other demand or duty in the name or lieu of the same, on pain of a præmunire; but that all the king's subjects of the said archdeaconry, and their executors and administrators, shall be ordered, intreated, and used for their goods and chattels after their decease, in like manner as is contained in the statute of the 21 *H.* 8. *c.* 5. for probate of testaments, and none otherwise: any use, custom, bull, composition, prescription, or ordinance heretofore obtained or used to the contrary notwithstanding.

[Fees for probate of wills or letters of administration of seamen's goods.]

And by the 31 *G.* 2. *c.* 10. No ecclesiastical court, or any person whatsoever, under any pretence, shall take more than one shilling for the seal, parchment, writing, and suing forth of the probate of any will, or any letters of administration, granted to the widow or children, father or mother, brother or sister, of any inferior officer, seaman, or marine, dying in the pay of his majesty's navy, and for the pains, trouble, and expence attending the suing forth of such probate or letters of administration, unless the goods do amount to the value of 20*l.*; nor more than two shillings, unless the goods do amount to the value of 40*l.*; nor more than three shillings, unless the goods do amount to the value of 60*l.* And in all cases where it shall be necessary to issue commissions, to swear the widows or children, father or mother, brother or sister, being executors or administrators of such inferior officers, seamen, or marines; no ecclesiastical court, or any person whatsoever, under any pretence, shall take more than one shilling for the seal, parchment, writing, and suing forth of any such commission, and for the pains, trouble, and expence attending the same, unless the goods do amount to 20*l.*; nor
[269] more than two shillings, unless the goods do amount to 40*l.*; nor more than three shillings, unless the goods do amount to 60*l.*: on pain of forfeiting 50*l.* to the party grieved; to be recovered, with full costs, by action of debt, bill, plaint, or information, in any of his majesty's courts of record at *Westminster*, or elsewhere. § 23.

Stamps.

[By 55 *Geo.* 3. *c.* 184. Schedule, Part the Third, the following stamp duties are imposed.

On *probates and letters of administration with the will annexed*, to be granted in *England*.

Where the estate and effects for or in respect of which such probate or letters of administration shall be granted, *exclusive of what the deceased shall have been possessed of or entitled to as a trustee, for any other person or persons, and not beneficially*, shall be—

	£		£		£	s.	d.
Above the value of	20	under the value of	100	-	0	10	0
Of the value of	100	——	200	-	2	0	0
——	200	——	300	-	5	0	0
——	300	——	450	-	8	0	0
——	450	——	600	-	11	0	0
——	600	——	800	-	15	0	0
——	800	——	1,000	-	22	0	0
——	1,000	——	1,500	-	30	0	0
——	1,500	——	2,000	-	40	0	0
——	2,000	——	3,000	-	50	0	0
——	3,000	——	4,000	-	60	0	0
——	4,000	——	5,000	-	80	0	0
——	5,000	——	6,000	-	100	0	0
——	6,000	——	7,000	-	120	0	0
——	7,000	——	8,000	-	140	0	0
——	8,000	——	9,000	-	160	0	0
——	9,000	——	10,000	-	180	0	0
——	10,000	——	12,000	-	200	0	0
——	12,000	——	14,000	-	220	0	0
——	14,000	——	16,000	-	250	0	0
——	16,000	——	18,000	-	280	0	0
——	18,000	——	20,000	-	310	0	0
——	20,000	——	25,000	-	350	0	0
——	25,000	——	30,000	-	400	0	0
——	30,000	——	35,000	-	450	0	0
——	35,000	——	40,000	-	525	0	0
——	40,000	——	45,000	-	600	0	0
——	45,000	——	50,000	-	675	0	0
——	50,000	——	60,000	-	750	0	0
——	60,000	——	70,000	-	900	0	0
——	70,000	——	80,000	-	1,050	0	0
——	80,000	——	90,000	-	1,200	0	0
——	90,000	——	100,000	-	1,350	0	0
——	100,000	——	120,000	-	1,500	0	0
——	120,000	——	140,000	-	1,800	0	0
——	140,000	——	160,000	-	2,100	0	0
——	160,000	——	180,000	-	2,400	0	0
——	180,000	——	200,000	-	2,700	0	0
——	200,000	——	250,000	-	3,000	0	0
——	250,000	——	300,000	-	3,750	0	0
——	300,000	——	350,000	-	4,500	0	0
——	350,000	——	400,000	-	5,250	0	0
——	400,000	——	500,000	-	6,000	0	0
——	500,000	——	600,000	-	7,500	0	0

	£		£		£	s.	d.
Of the value of	600,000	and under	700,000	-	9,000	0	0
	700,000	——	800,000	-	10,500	0	0
	800,000	——	900,000	-	12,000	0	0
	900,000	——	1,000,000	-	13,500	0	0
——	1,000,000	and upwards		-	15,000	0	0

On letters of administration without a will annexed, to be granted in *England.*

Where the estate and effects for or in respect of which such letters of administration shall be granted, or whereof such inventory shall be exhibited *exclusive of what* the deceased shall have been possessed of or entitled to as a trustee for any other person or persons, and not beneficially, shall be —

	£		£		£	s.	d.
Above the value of	20	and under	50	-	0	10	0
Of the value of	50	——	100	-	1	0	0
——	100	——	200	-	3	0	0
——	200	——	300	-	8	0	0
——	300	——	450	-	11	0	0
——	450	——	600	-	15	0	0
——	600	——	800	-	22	0	0
——	800	——	1,000	-	30	0	0
——	1,000	——	1,500	-	45	0	0
——	1,500	——	2,000	-	60	0	0
——	2,000	——	3,000	-	75	0	0
——	3,000	——	4,000	-	90	0	0
——	4,000	——	5,000	-	120	0	0
——	5,000	——	6,000	-	150	0	0
——	6,000	——	7,000	-	180	0	0
——	7,000	——	8,000	-	210	0	0
——	8,000	——	9,000	-	240	0	0
——	9,000	——	10,000	-	270	0	0
——	10,000	——	12,000	-	300	0	0
——	12,000	——	14,000	-	330	0	0
——	14,000	——	16,000	-	375	0	0
——	16,000	——	18,000	-	420	0	0
——	18,000	——	20,000	-	465	0	0
——	20,000	——	25,000	-	525	0	0
——	25,000	——	30,000	-	600	0	0
——	30,000	——	35,000	-	675	0	0
——	35,000	——	40,000	-	785	0	0
——	40,000	——	45,000	-	900	0	0
——	45,000	——	50,000	-	1,010	0	0
——	50,000	——	60,000	-	1,125	0	0
——	60,000	——	70,000	-	1,350	0	0
——	70,000	——	80,000	-	1,575	0	0
——	80,000	——	90,000	-	1,800	0	0
——	90,000	——	100,000	-	2,025	0	0
——	100,000	——	120,000	-	2,250	0	0
——	120,000	——	140,000	-	2,700	0	0
——	140,000	——	160,000	-	3,150	0	0
——	160,000	——	180,000	-	3,600	0	0
——	180,000	——	200,000	-	4,050	0	0

	£		£		£	s.	d.
Of the value of	200,000	and under	250,000	-	4,500	0	0
———	250,000	———	300,000	-	5,625	0	0
———	300,000	———	350,000	-	6,750	0	0
———	350,000	———	400,000	-	7,875	0	0
———	400,000	———	500,000	-	9,000	0	0
———	500,000	———	600,000	-	11,250	0	0
———	600,000	———	700,000	-	13,500	0	0
———	700,000	———	800,000	-	15,750	0	0
———	800,000	———	900,000	-	18,000	0	0
———	900,000	———	1,000,000	-	20,250	0	0
———	1,000,000 and upwards			-	22,500	0	0

Exemptions *from all stamp duties.*

Probate of will, letters of administration, confirmation of testament, and eik thereto, and inventory of the effects of any common seaman, marine, or soldier, who shall be slain or die in the service of his majesty, his heirs or successors.

Additional inventory to be exhibited and recorded in any commissary court in Scotland; where the same shall not be liable to a duty of greater amount than the duty already paid upon any former inventory exhibited and recorded of the estate and effects of the same person.

LEGACIES and SUCCESSIONS to personal or moveable estate upon intestacy.

I. *Where the testator, testatrix, or intestate died before or upon the 5th April,* 1805.

For every legacy, specific or pecuniary, or of any other description, of the amount or value of 20*l.* or upwards, given by any will or testamentary instrument of any person, who died before or upon the *5th April,* 1805, out of his or her personal or moveable estate, and which shall be paid, delivered, retained, satisfied, or discharged, after the 31*st August*, 1815.

Also for the clear residue (when devolving to one person), and for every share of the clear residue (when devolving to two or more persons), of the personal or moveable estate of any person who died before or upon the *5th April*, 1805 (after deducting debts, funeral expences, legacies, and other charges first payable thereout), whether the title to such residue, or any share thereof, shall accrue by virtue of any testamentary disposition, or upon a partial or total intestacy; where such residue, or share of residue, shall be of the amount or value of 20*l.* or upwards, and where the same shall be paid, delivered, retained, satisfied, or discharged, after the 31*st August*, 1815.

Where any such legacy, or residue, or share of such residue, shall have been given, or have devolved, to or for the benefit of *a brother or sister of the deceased, or any descendant of a brother or sister of the deceased;* a duty at and after the rate of 2*l.* 10*s. per centum,* on the amount or value thereof.

Where any such legacy, or residue, or share of such residue, shall have been given, or have devolved, to or for the benefit of *a brother or sister of the father or mother of the deceased, or any descendant of a brother or sister of the father or mother of the deceased;* a duty at or after the rate of 4*l. per centum*, on the amount or value thereof.

Where any such legacy, or residue, or share of such residue, shall have been given, or have devolved, to or for the benefit of *a brother*

or sister of a grandfather or grandmother of the deceased; or any descendant of a brother or sister of a grandfather or grandmother of the deceased; a duty on the amount or value thereof at and after the rate of - - - - *per centum* £ 5 0 0

And where any such legacy, or residue, or share of such residue, shall have been given, or have devolved, to or for the benefit of any person, *in any other degree of collateral consanguinity to the deceased* than is above described, or to or for the benefit of *any stranger in blood to the deceased;* a duty on the amount or value thereof at and after the rate of - - - *per centum* £ 8 0 0

II. *Where the testator, testatrix, or intestate, shall have died after the 5th April,* 1805.

For every legacy, specific or pecuniary, or of any other description, of the amount or value of 20*l.* or upwards, given by any will or testamentary instrument, of any person, who shall have died after the *5th April,* 1805, either out of his or her personal or moveable estate, or out of or charged upon his or her real or heritable estate, or out of any monies to arise by the sale, mortgage, or other disposition of his or her real or heritable estate, or any part thereof, and which shall be paid, delivered, retained, satisfied, or discharged, after the 31st *August,* 1815.

Also, for the clear residue (when devolving to one person) and for every share of the clear residue (when devolving to two or more persons) of the personal or moveable estate, of any person, who shall have died after the *5th April,* 1805, (after deducting debts, funeral expences, legacies, and other charges first payable thereout,) whether the title to such residue, or any share thereof, shall accrue by virtue of any testamentary disposition, or upon a partial or total intestacy; where such residue, or share of residue, shall be of the amount or value of 20*l.* or upwards, and where the same shall be paid, delivered, retained, satisfied, or discharged, after 31*st August,* 1815.

And also for the clear residue (when given to one person) and for every share of the clear residue (when given to two or more persons) of the monies to arise from the sale, mortgage, or other disposition, of any real or heritable estate directed to be sold, mortgaged, or otherwise disposed of, by any will or testamentary instrument, of any person, who shall have died after *5th April,* 1805, (after deducting debts, funeral expences, legacies, and other charges first made payable thereout, if any) where such residue, or share of residue, shall amount to 20*l.* or upwards, and where the same shall be paid, retained, or discharged, after 31*st August,* 1815.

Where any such legacy or residue, or any share of such residue, shall have been given, or have devolved, to or for the benefit of *a child of the deceased, or any descendant of a child of the deceased,* or to or for the benefit of *the father or mother, or any lineal ancestor of the deceased;* a duty on the amount or value thereof at and after the rate of - - - - - - *per centum* £ 1 0 0

Where any such legacy, or residue, or any share of such residue, shall have been given, or have devolved, to or for the benefit of *a brother or sister of the deceased, or any descendant of a brother or sister of the deceased;* a duty on the amount or value thereof at and after the rate of - - - - - *per centum* £ 3 0 0

Where any such legacy, or residue, or any share of such residue,

shall have been given, or have devolved, to or for the benefit of *a brother or sister of the father or mother of the deceased, or any descendant of a brother or sister of the father or mother of the deceased;* a duty on the amount or value thereof at and after the rate of - - - - - *per centum* £ 5 0 0

Where any such legacy, or residue, or any share of such residue, shall have been given, or have devolved, to or for the benefit of *a brother or sister of a grandfather or grandmother of the deceased, or any descendant of a brother or sister of a grandfather or grandmother of the deceased;* a duty on the amount or value thereof at and after the rate of - - - - *per centum* £ 6 0 0

And where any such legacy, or residue, or any share of such residue, shall have been given, or have devolved, to or for the benefit of any person, *in any other degree of collateral consanguinity to the deceased* than is above described, or to or for the benefit of *any stranger in blood to the deceased;* a duty on the amount or value thereof at and after the rate of - - - - - *per centum* £ 10 0 0

And all gifts of annuities, or by way of annuity, or of any other partial benefit or interest, out of any such estate or effects as aforesaid, shall be deemed legacies within the intent and meaning of this schedule.

And where any legatee shall take two or more distinct legacies or benefits, under any will or testamentary instrument, which shall altogether be of the amount or value of 20*l.* each, shall be charged with duty, though each or either may be separately under that amount or value.

(How to calculate the value of annuities, see 36 G. 3. *c.*52. § 8. Tab. I., II.)

Exemptions.

Legacies, and residues, or shares of residue, of any such estate or effects as aforesaid, given or devolving to or for the benefit of the husband or wife of the deceased, or to or for the benefit of any of the royal family. (*See* 36 G. 3. *c.* 52. § 2. 45 *G.* 3. *c.* 28. § 3.)

And all legacies which were exempted from duty by the act passed in the 39 *G.* 3. *c.* 73. *for exempting certain specific legacies given to bodies corporate, or other public bodies, from the payment of duty.*]

26. If the executor die intestate, the testator also from that time shall be deemed intestate, and administration may be committed in this case of the goods not administered. *Swin.* 382. 1 *Roll's Abr.* 907. **Executor dying.** [270]

But if the executor maketh an executor and dieth; his executor shall be executor to the first testator, in case there be no executor. *Swin.* 329.

And if the executor of an executor assume the administration of the first testator's goods, he cannot afterwards refuse the administration of the goods of the latter testator; but he may accept the latter, yet refuse the former. *T.* 17 *J. Wolfe* and *Heyden, Hutt.* 30.

[Where the executor dies before the proving of the will, his executor cannot take upon himself the execution of the first will; but administration of the goods of the first testator, with

the will annexed to it, is to be committed to the executor of the executor, if the residue of the goods of the first testator (the legacies performed) were bequeathed by his last will to the first executor; or (else) to such other person or persons to whom the said residue is bequeathed; otherwise to the next of blood to the first testator demanding it. And this (*ex relatione* Dr. Drury, judge of the prerogative court of Canterbury) is the usage and custom of the said court, and agreeable to law, as seemed to him; to which the court gave credit. *Isted* v. *Stankey, Dyer*, 372. (1)]

E. 4 & 5 *P.* & *M.* Two executors; one of them proved the will, the other refused before the ordinary, who thereupon granted administration to the other, who made his executor, and died; and that executor alone brought an action of debt, for a debt due to the first testator: and adjudged, that the action did lie; for though he who refused might administer at any time, yet it must be in the lifetime of his companion; and he being dead, that election is gone. *Dyer*, 160.

Tingrey v. *Brown.* In this case the testatrix by her will made Francis Tingrey her sole executor, who proved the will, and afterwards died intestate: The plaintiff took out administration of his effects, but it was held that she could not sue the defendant for the double value of lands held over after notice to quit under a demise from the testatrix, contrary to the 4 *G.* 2. *c.* 28., without taking out administration *de bonis non*, even though the tenant had attorned to her. 1 *Bos.* & *Pul.* 310.

II. *Of the Administration of Intestates' Effects.*

This matter concerning the administration of intestates' effects, so far as the same hath respect unto peculiar jurisdictions, *bona notabilia*, process in the king's name, the oath *in animam constituentis*, administration by commission, and the fees of administration of seamen's effects, hath been treated of already in the law concerning the probate of wills.

Power of the ordinary. [271]

1. As to the disposition of intestates' effects, and granting administration, it is plain, that by the common law, and before the statute of the 13 *Ed.* 1. *st.* 1. *c.* 19. here following, the ordinary had the absolute disposal of intestates' effects. 2 *Bac. Abr.* 398. (2)

(1) Adhered to in *Day* v. *Chapfield*, 1 *Vern.* 200.

(2) The following note is transcribed from *Dr. Phillimore's Reports*, 1st vol. 124. The jurisdiction which the ecclesiastical court exercises over the effects of persons dying without a will rests on a very ancient foundation: in the early periods of our history the ordinary had by common law the absolute disposal of the personal property of all intestates; and, under the pretext of applying their goods to religious

But lord *Coke* thinks, that this was granted to him by some particular constitutions; and therefore says, that anciently the kings of England, by their proper officers were wont to take goods of intestates in their hands. 9 *Co.* 36. [*Henslow's case.*]

And there are several instances in Madox's History of the Exchequer, where the king issued a mandate to his officers, to attach the goods of divers persons who died intestate. *Mad. Exch.* 237.

But this seemeth to have been only in case where they were indebted to the king; who, by the law, was to be satisfied before the other creditors; according to the statute of *Magna Charta*, c. 18., which enacteth as follows: If any that holdeth of us lay fee do die, and our sheriff or bailiff do shew our letters patents of our summons for debt, which the dead man did owe to us; it shall be lawful to our sheriff or bailiff to attach and inroll all the goods and chattels of the dead, being found in the said fee, to the value of the same debt, by the sight and testimony of lawful men, so that nothing thereof shall be taken away, until we be clearly paid of the debt.

But so much as remained over and above the king's debt, or if nothing was owing to the king, then the whole was in the sole power of the ordinary to dispose. And therefore if a man died intestate, neither his wife, child, or next of kin, had any right to a share of his estate, but the ordinary was to distribute it according to his conscience to pious uses; and sometimes the wife and children might be amongst the number of those whom he appointed to receive it; but, however, the law trusted him with the sole disposition. 2 *Bac. Abr.* 398.

The first statute that abridged the power of the ordinary herein, was the aforementioned statute of the 13 *Ed.* 1. *st.* 1. *c.* 19., by which it is enacted as followeth: Whereas after the death of a person *dying intestate, which is bounden to some other for debt, the*

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purposes (*in pios usus*), possessed itself of them, not only in cases where the deceased left a widow and children, or other near relations, but in defiance also of the just claims of creditors. On this footing the law continued under the Norman kings and the first sovereigns of the line of Plantagenet; but when the free spirit of our constitution, which had been long labouring under the pressure of the feudal institutions and the shackles of papal superstition, commenced those struggles which ultimately led to its emancipation, the abuses practised by the ordinary in the administration of the effects of intestates, became in their turn subjected to correction and controul.

The 32d article of the *Magna Charta*, extorted from king John, expressly provides against them; but it is a curious fact, and one which strongly marks the influence of the papal power in England at that period, that this article was wholly omitted in the *Magna Charta* of Henry III.

goods come to the ordinary to be disposed; the ordinary from henceforth shall be bound to answer the debts as far forth as the goods of the dead will extend, in such sort as the executors of the same party should have been bounden, if he had made a testament.

Dying intestate] There be divers kinds of intestates; one, that maketh no will at all; another, that maketh a will and executors, and they refuse, in this case he dieth *quasi intestatus;* and
[272]
these are within the purview of this act. Therefore the ordinary is the person whom the law appointeth to have the charge or administration of the goods and chattels of the party that dieth intestate, or *quasi intestatus.* And justly did the law in this case appoint the ordinary; for the law presumed, that he who had the care of his soul in his lifetime, would after his death have care of his temporal goods and chattels, to see them well disposed and administered. 2 *Inst.* 397.

Which is bounden to some other for debt] This is not only intended of an obligation or deed in writing, but howsoever he was charged in law, as for rent upon a lease, or upon an assumpsit, or the like. 2 *Inst.* 397.

For debt] This act is not only intended of that which is properly a debt, but of all duties, covenants, or just causes of action, such as might be brought against executors. 2 *Inst.* 897.

The goods come to the ordinary to be disposed] So that this statute doth not give this power of disposing, but supposeth it in the ordinary; the statute being, as to this, in affirmance only of the common law. 5 *Co.* 83.

But unless some of the goods or chattels came to the hands and possession of the ordinary, he was not to be charged by the common law; but if they came to his hands, and he should neither administer and pay the debts and duties himself, nor commit them over to the kin and friends of the intestate that would, the common law did charge him, and so doth this act, which is made in affirmance of it. 2 *Inst.* 397.

Goods come to the ordinary] If a man die intestate, and a stranger taketh the goods: the ordinary shall not have an action of trespass for taking of them (unless he had taken them into his possession). But the executor or administrator, before seizure, may have an action of trespass. 2 *Inst.* 397.

Come to the ordinary] Neither can the ordinary have any action of debt, covenant, or any other action, which belonged to the intestate; but those to whom the ordinary committeth administration may have all these actions by the statute of the 31 *Ed.* 3. (hereafter following); but before that statute, there was no remedy by law given to the administrators, to recover those things in action. 2 *Inst.* 397, 398.

But by the common law, an action of debt did lie against the

administrators, but it was by the name of executors until the said statute of the 31 *Ed.* 3. 2 *Inst.* 398.

To the ordinary] If the ordinary take goods of the intestate, being out of his diocese, he shall not be charged as ordinary by this act; because he taketh them of his own wrong, and not as ordinary, in which right he is to be charged by this act. 2 *Inst.* 398. [273]

Ordinary] That is, not only the bishop, but every one that is in stead of the bishop, in this matter of taking care and cognizance of the goods of intestates; as archdeacon, chancellor, commissary, official, and those who have peculiar jurisdiction. Some of whom having, from time to time, accidentally omitted their title, or style of jurisdiction in the letters of administration, by them granted, have occasioned various contests in the courts of common law, concerning the validity of administrations executed in virtue of such letters; as the judgments upon the validity or invalidity of them have been also various. The enumeration of which is not material; since there is one safe, short, and plain rule, (*viz.* the inserting in all such letters the style of jurisdiction, as well as the name of the ordinary) which, being observed, is a security for ever against all such contests. *Gibs.* 478.

And not only an ordinary or guardian of the spiritualties, or others that be in the place of the ordinary of right, are within this act; but also such as usurp the place, and are in possession by wrong, are to be charged by this act. 2 *Inst.* 398.

To be disposed] If it be demanded what interest the ordinary hath in the goods of the person intestate, which come to his hands; it is answered, that he hath such an interest, as the administrator to whom administration is committed during the minority of an executor, to the behoof and profit of the executor, and not otherwise, nor in other manner. So as the ordinary may administer for the good of the intestate, but cannot give the goods of the intestate, or do any thing to his prejudice. 2 *Inst.* 398.

The ordinary from henceforth shall be bound] If goods of the intestate come to the hands of the ordinary, and he dieth, although the words be that *the ordinary shall be bound*, yet his executors or administrators shall be charged in an action of debt; for when this act bindeth the ordinary, by consequence his executors or administrators are bound. But if the ordinary commit administration to one, and he taketh the goods into his possession and dieth, no action lieth against his executors. 2 *Inst.* 398.

If the ordinary take goods into his hands of the intestate, and after commit administration, and the ordinary retaineth the goods; he shall be charged, notwithstanding the committing of administration. 2 *Inst.* 398. [274]

Shall be bound to answer] At the common law the ordinary

might have had trespass for goods taken out of his possession: but no action did lie against the ordinary: but now by this statute an action lies against him; but he cannot have action by this statute. 1 *Roll. Abr.* 906.

Ordinary may be compelled. 2. If administration is denied by the ordinary to the person who is entitled to it, a mandamus will go from the temporal courts to grant it; except a controversy is depending, whether there is a will or not; for then (as *Holt* chief justice said) suppose the will should prove good, what will the granting of administration signify? *Gibs.* 478.

H. 3 *G.* 2. *K.* and *Betlesworth.* In the case of a will, a mandamus was granted to Dr. Bettesworth, as judge of the prerogative court of Canterbury, to grant probate of the earl of Londonderry's will, to the executors therein named. The doctor returned, that it was the custom and practice of the prerogative court, that if any creditor of the deceased enters a caveat against granting probate, and swears himself to be a creditor, there goes out a commission of appraisement, till the return whereof the judge hath not used nor ought to grant any probate; then he sets out, that two creditors, who swore to their debts, entered a caveat, and prayed a commission of appraisement; which was decreed and issued, but is not yet returnable; and for that cause he cannot as yet grant a probate. Upon argument, the court held the return to be ill; for that the judge can only stay the probate, where there is a contest about the validity of the will. This commission of appraisement can be of no use but to spend money, and delay the executor from getting in the effects of the testator. And by the 21 *H.* 8. *c.* 5. the probate is to be granted *with convenient speed without any frustratory delay*; and the ecclesiastical court shall never be suffered to set up their practice against the law of the land. And a peremptory mandamus was granted. *Str.* 857.

H. 4 *G.* 2. *Smith*'s case. It was moved for a mandamus to Dr. Bettesworth, commanding him to grant administration to Smith of the goods of his deceased son, during the minority of his grandson. Against this it was insisted, that a father hath not [275] an equal right with the son; and that the spiritual court hath always considered these administrators only as trustees for the infant, and have never kept to any rule in granting them, but according to the circumstances of the family: where there are several in equal degree, as children, they have always chosen which they pleased. And by the court, when we grant a mandamus, it is to oblige the judge to do right to the party who sues the writ; but as there is no law which says to whom these administrations during minority shall be granted, there is no law to be put in execution. In the case of the next of kin, he is intitled *de jure*; and therefore in this case we grant a mandamus

of course. We will grant no mandamus in this case. *Str.* 892. [*Vid. infra*, 14.]

M. 7 *G.* 2. *K.* and *Betteswoorth.* John Kynaston, esq., made his will, and two persons executors, and left the residue of his personal estate to his youngest son Edward. The executors renounced; and the residuary legatee moved for a mandamus to be admitted to prove the will, and have administration with the will annexed. And a rule was made to shew cause. On shewing cause, it was insisted, that this case differed from lord *Londonderry's*, where the commission of appraisement was set up against the immediate grant of the probate, which the statute of the 21 *H.* 8. *c.* 5. requires shall be without any frustratory delay; and the ordinary hath no election there: whereas in the present case, he is not bound to grant the administration to the residuary legatee, none of the statutes mentioning him; on the contrary, the statute of the 21 *H.* 8. *c.* 5., which takes notice of the renunciation of executors, leaves the matter to the election of the ordinary. And of this opinion was the court: who said, if the commission of appraisement was a grievance, it would be proper matter of appeal, but they could not break into the practice of the court below. And lord *Hardwicke* mentioned a case in chancery before lord *Macclesfield*, between Wheeler and the archbishop of Canterbury, where it was held, that these sort of administrations are not within the statute of distribution; which brings it to *Smith's* case, where a mandamus to grant administration during the minority of an executor, to the father of the executor, was refused; because there was no law obliging the spiritual court so to do. And the rule for a mandamus was discharged. *Str.* 956.

H. 4 *G.* 2. *K.* and *Betteswoorth.* Mandamus to grant administration to John Cullom, of Joan his wife. Return: that by articles [276] before marriage it was agreed, that the wife should have power to make a will, and dispose of her leasehold estate; that pursuant to this power, she made a will, and her mother executrix, who hath duly proved the same. To this return it was objected, that she might have things in action not covered by the deed, and the husband was in all events intitled to an administration as to them. Which was agreed to by the court; and a peremptory mandamus was granted. *Str.* 891.

T. 12 *G.* 2. *K.* and *Betteswoorth.* Mandamus to grant administration to Mr. Bridgen, husband of the late lady Bellamont, deceased. The dean of the arches returned, that a suit had been commenced before him, between Mr. Bridgen and a son of the deceased, who claimed to be her executor under a will made by her pursuant to a deed executed before marriage; whereby the husband agreed she should have power to make a will, and dispose of her estate; which deed Mr. Bridgen had confessed;

and thereupon sentence had been given for the validity of the disposition, but not for any executorship created thereby: and thereupon a new suit was instituted by the daughter against the son and Mr. Bridgen, for administration with the will annexed; which is still depending. And upon consideration the court declared, that no peremptory mandamus ought to go: for though generally the husband is intitled to the administration as next of kin; yet that is in respect of the interest he has in the estate; and because nobody is in equal degree: and that is the reason, why administrations are so often granted to a residuary legatee: and though strictly speaking this is no will, but rather an appointment which is to operate in equity: yet the true question is, whether this is such an intestacy as is within the meaning of the statute. And the law, particularly the 29 *C.* 2. *c.* 3., considers *femes covert* as having some right to dispose of their effects; which can only be by the agreement of the husband, which appears in this case; and this differs greatly from the case of *Cullom*, where the power was only as to a leasehold estate, whereas she might have other effects. The matter is properly under the consideration of the spiritual court to whom to grant the administration, and there is no reason for us to interpose; and therefore the return must be allowed. *Str.* 1112.

Refusal of administration.

3. The person to whom administration is granted, may refuse to take it upon him if he will; for the ordinary hath not power to compel him to accept it. *Swin.* 384.

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To be granted to the widow or next of kin.

4. By the statute of the 31 *Ed.* 3. *st.* 1. *c.* 11. In case where a man dieth intestate, *the ordinary shall depute to the next and most lawful friends* of the deceased, to administer his goods.

The ordinary shall depute] Before this statute the ordinary was not *compellable* to grant administration; but now by this act he is commanded, and thereby compellable to grant administration; and a refusal to do it is a contempt to the king, and an injury to the party. 9 *Co.* 40.

To the next and most lawful friends] Before this act, the ordinaries might have granted administration to whom they pleased; but hereby they are restrained to the next and most lawful friends. 9 *Co.* 40.

Most lawful friends] That is, to the next of blood, who are not attainted of treason, felony, or have other lawful disability. 9 *Co.* 40.

As by the 9 & 10 *W.* *c.* 32. persons denying the Trinity, or asserting that there are more Gods than one, or denying the christian religion to be true, or the holy scriptures to be of divine authority, shall for the second offence be disabled to be administrators.

And by the several acts for qualifying for offices, persons executing their offices not being qualified, after the time limited for their qualification shall be expired, shall be disabled to be administrators.

If a *bastard* dies intestate, without wife or issue, leaving a personal estate; in such case, the king shall be entitled, and the ordinary shall grant administration to the king's patentee. 3 *Peere Will.* 33.

And by the statute of the 21 *H.* 8. *c.* 5. In case any person die intestate, or the executors named in any testament refuse to prove the said testament; then the ordinary, or other person having authority to take probate of testaments, shall grant the administration of the goods of the testator, or person deceased, *to the widow of the same person deceased, or to the next of kin, or to both,* as by the *discretion* (3) of the same ordinary shall be thought good. And in case where divers persons claim the administration as next of kin, which be equal in degree of kindred to the testator or person deceased: and where any person only desireth the administration as next of kin, where indeed divers persons be in equality of kindred; in every such case the ordinary to be at his election and liberty to accept any one or more making request, where divers do require the administration: or where but one, or more of them, and not all being in equality of degree, do make request; then the ordinary to admit the widow, [278] and him or them only making request, or any one of them, at his pleasure. § 3, 4. (*n*)

To the widow of the same person deceased, or *to the next of his kin*] *T.* 9 *G.* It was moved for a mandamus to the official of the bishop of Gloucester to commit administration to the widow of an intestate. But by the court: That will be to deprive the ordinary of his election, in granting it to her, *or* the next of kin; therefore take your mandamus generally, to grant administration of the goods of the intestate. *Str.* 552. (4)

Or both] And this, either jointly or separately (5): for the

(3) See the cases of *The King* v. *Betlesworth, supra,* 275, 276.

(*n*) The construction of this statute, upon the proximity of degrees, must be according to common law. 12 *Mod.* 616.

(4) A widow (cousin german to her deceased husband) cannot take administration in a double capacity, as widow and one of the next of kin, under 22 & 23 *C.* 2. *c.* 10. *Per* sir *W. Wynne,* in *Booth* v. *Panton, Mich. T.* 1788, *Prerog. MSS. Cas.* 14. Administration was granted to a second wife, the first having been divorced *à vinculo* by a royal ordinance in Denmark (see *Harford* v. *Morris,* 2 *Hagg. Rep.* 423.), the parties divorced being both Danish subjects. *Ryan* v. *Ryan,* 2 *Phill. Rep.* 332.

Sole or joint administration.

(5) The court prefers *cæteris paribus* sole to a joint administration; because it is infinitely better for the estate. Administrators must join and be joined in every act, which would not only be inconvenient to themselves, but, what is of more consequence, must be inconvenient to those who have demands on the estate, either as creditors or as entitled in distribution. *Warwick* v. *Greville,* 1 *Phill. Rep.* 126.

A fortiori the court never forces a joint administration, or grants

ordinary may grant several administrations of several parts of the goods of the intestate. 1 *Roll's Abr.* 908.

Thus in the case of *Fawtry* and *Fawtry*, *H.* 3 *W.* A man died intestate, leaving a wife and a brother. The ordinary had granted the administration of some particular debts to the brother, and of the residue to the wife. And a mandamus was moved for to grant administration to the wife. But by the court: The ordinary may grant administration to the brother as to part, and to the wife for the rest; in which case neither can complain, since the ordinary need not have granted any part of the administration to the party complaining. But if the intestate leave a bond of 100*l.*, the ordinary cannot grant administration of 50*l.* to one person and 50*l.* to another, because this is an intire thing. 1 *Salk.* 36.

To the husband of the wife's effects.

5. If a *feme covert* die intestate; administration of her goods of right appertaineth to her husband, as her *next and most lawful friend* within the statute. 1 *Roll's Abr.* 910. (6)

And this is confirmed by the statute of the 29 *C.* 2. *c.* 3. which enacteth, that the statute of the 22 & 23 *C.* 2. *c.* 10. concerning the distribution of intestates' effects, *shall not extend to the estates of* femes covert *that shall die intestate, but that their husbands may demand and have administration of their rights,*

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it to unwilling or adverse parties; because, as it is necessary for them to join in every act, there might be a complete contrariety of action, and it would be in the power of one of them to defeat the whole administration. *Bell* v. *Timiswood*, 2 *Phill. Rep.* 22. *Dampier* v. *Colson*, *id.* 55. *Fearon* v. *Campion*, *Prer. E. T.* 1789, *MSS. Cas.* 13.

(6) This right is exclusive, and the ordinary has no power to grant administration to any but the husband. Sir *Geo. Sand's* case, 3 *Salk.* 22. *Humphreys* v. *Bullen*, 1 *Atk.* 458. Thus if the husband dies before he has received a legacy left to her, the administrator *de bonis non* of the wife shall be a trustee only for the administrator of the husband. *Humphreys* v. *Bullen*. In *Elliot* v. *Collier*, 3 *Atk.* 527., it is said, that though the ecclesiastical courts are bound by the statute to grant administration to the next of kin of a wife, yet that does not bind the right in equity; for a surviving husband has her whole right vested in him at the time of her death, and her whole property belongs to him. Again, where a *feme covert* has a power to dispose of her estate by will, the writing she leaves ought first to be propounded as a will in the spiritual court: and if no executor is appointed, they will grant administration to the husband, with the will annexed. *Ross* v. *Ewer*, 3 *Atk.* 160. In *Browning* v. *Reane*, 2 *Phill. Rep.* 57., administration of a wife's effects was refused to the husband, on the ground that his marriage had been illegally contracted with an idiot, not enjoying a lucid interval at the time of her marriage. In this case a verdict on a writ *de lunatico inquirendo*, taken out six months *after* her marriage, had found her incapable from two years before that event. And see 15 *G.* 2. *c.* 30.

credits, and other personal estates, and recover and enjoy the same as they might have done before the making of the said act. 29 *C.* 2. *c.* 3. § 5. (*o*)

And if the husband die before administration taken by him; his executors or administrators, and not the wife's next of kin, shall be intitled in equity. 1 *P. W.* 381.

As in the case of *Elliot* and *Collier*, July 1, 1747: One question in the cause was, whether the husband dying without administering to the personal estate the wife had in her own right, it shall go to the next of kin of the wife, or to the representative of the husband. By lord *Hardwicke*: The representative of the wife has no right to an account of her personal estate. That point doth not follow barely the legal right of administration; for though the ecclesiastical court are bound by act of parliament to grant the administration to the next of kin to the wife, yet that doth not bind the right in this court. For the husband surviving the wife, her whole estate vested in him at the time of her death. There are several cases where it has been held, that though the ecclesiastical court are bound to grant administration by 31 *Ed.* 3. *c.* 11., yet those persons have been looked upon in this court as mere trustees. Suppose the wife had survived the husband, only such part of her personal estate as had continued *choses in action* would have survived to her; for whatever he had reduced into possession, would have been the husband's. Upon the equity of the statute of distribution, this court makes an *administrator de bonis non* only a trustee for such part of the testator's personal estate as is undisposed of, for his next of kin. Therefore I am of opinion, the husband's representative is intitled to the wife's personal estate, and that it vested in the husband before administration was taken out. 3 *Atk.* 526. (7) [279]

(*o*) Vide *infra*, *Distribution*, for the explanation of this statute.

(7) A husband appoints his wife executrix and residuary legatee; they are drowned by the same shipwreck; and no proof being adduced that the wife survived, it was assumed that they perished at the same moment, and administration was granted to the representatives of the husband. *Taylor* v. *Diplock*, 2 *Phill. Rep.* 261. See also *Wright* v. *Netherwood*, or *Sarmuda*, *id.* 266. 277.; and 2 *Salk.* by *Evans*, 593.

In *General Stanwix's* case (see *Fearne's Posthumous Works*, 37.), a father and daughter perished at sea in the same storm. Had the daughter survived the father, a different representative would have been entitled to claim under her. It was argued by those who would be benefited by the father's survivorship, that the general was most likely on deck holding to the rigging, while the daughter in the cabin met an earlier death. Their difference of ages, constitution, &c. was advanced on the other side; and it was contended thereupon, that the daughter in all probability was longer in dying than the father. A claim was also brought forward by the representative of

But if the wife was executrix to another; then, as to the goods which she had in that capacity, administration must be granted to the next of kin to the testator. [Sir *George Sands*'s case,] 3 *Salk*. 21.

To the father or mother, of their children's effects.

6. Administration may be granted of the goods of the son or daughter, to the father or mother, as next of blood. *Law of Test*. 466.

To the grandmother before uncles and aunts.

7. If one dies intestate, leaving a grandmother and uncles and aunts; the grandmother is intitled to the administration, in exclusion of the uncles and aunts. *Pre. Cha.* 527.

To the son before the grandfather.

8. If there be grandfather, father, and son; and the father dies intestate; the son shall have the administration, and not the grandfather. 2 *Vern*. 125.

Half blood.

9. Administration must be granted to the brother of the half blood before the uncle; for he has the immediate blood of the father, which the uncle hath not. [*Brown*'s case, 5 *Ed*. 6., cited in *Collingwood* v. *Pace*,] 1 *Ventr*. 424.

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And the half blood in this respect is esteemed as near as the whole. But if there is a brother, and a sister of the half blood, and the sister is married; then it must be granted to the brother, and not to her and her husband; because in effect it makes the husband administrator, who is not of kin to the intestate; and if she die, the husband would still continue administrator, and so might possess himself of the whole personal estate. 3 *Salk*. 21.

In general, to the next of kindred. (8)

10. Generally, by the statute aforesaid, administration shall be granted to the wife or *next of kindred:* and who these *next of kindred* are, will fall in more properly under the head concerning distribution.

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a second wife of the general, who perished at the same time. Lord *Mansfield* recommended a compromise; saying, there was no legal principle on which he could decide it.

A jury in Wales found, that of a father and son hanged in one cart, the latter, by appearing to struggle longest, became seised of an estate in fee by survivorship; so that his seisin gave his widow a verdict for her dower. *Broughton* v. *Randall*, *Cro. El*. 503.

(8) Where there are several next of kin in equal degrees, administration is granted to the person who unites the majority of interests, unless there is some ground of objection, or some reason for preferring another. *Budd* v. *Silver*, 2 *Phill. Rep*. 115. Primogeniture alone, without support of majority of the parties interested, gives an elder brother no right to an administration. *Earl of Warwick* v. *Greville*, 1 *Phill. Rep*. 123. *Cæteris paribus*, a man accustomed to business, fixed on by majority of next of kin, is preferred as an administrator. *Williams* v. *Wilkins*, 2 *Phill. Rep*. 100. The application of a married sister to be joined in an administration with her two brothers, was overruled where the latter objected to her being joined; for the brothers have a majority of interests. Nor will the court force a joint administration on unwilling parties; nor grant from the residuary legatees

11. There is one exception to the rule about the next of kin, in case where the executor refuseth, or accepting dies intestate; and that is, with respect to the residuary legatee: who being intitled to what remains after debts and legacies paid, hath the first and best title to be administrator of the estate; as was agreed in the case of *Thomas* and *Butler*, *T.* 24 *C.* 2. For this taketh away the presumption of the statute, that the testator would have given it to the next of kin. *Gibs.* 479. [*Thomas* v. *Butler.*] 1 *Ventr.* 217. (9)

Residuary legatee, or principal creditor.

And by *King* lord chancellor, *M.* 1725. Notwithstanding the statute of *Hen.* 8. administrations have been granted to the principal creditor from the next of kin, by the opinion of both civil and common lawyers; where it is visible, that the next of kin cannot have any advantage or benefit of the estate. And this hath been always taken to be out of the statute. *Viner*, Executors, K. 24.

But this, as it seemeth, should be understood only in case where the kindred refuse to accept the administration. And the practice is usually for the ordinary first to issue a citation for the next of kin in special, and all others in general, to accept or refuse letters of administration, or shew cause why the same should not be granted to a creditor. And such creditor must make an affidavit of his debt, and therein set forth how much it is, and how due. And in case there are several creditors, the court generally obliges them to enter into articles and bond of average. For this kind of administration being out of the aforesaid statutes, the same falls back upon the original power which the ordinary had at common law; whereby he may grant ad-

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to a nominee where the parties cannot agree. *Dampier and Dampier* v. *Colson*, 2 *Phill. Rep.* 54.

The wishes of creditors, as to the appointment of an administrator, are not in all cases of weight, but are entitled to consideration where the estate is considerable, the demands heavy, and the solvency in the slightest degree doubtful. *Warwick* v. *Greville*, 1 *Phill. Rep.* 127.

(9) Residuary legatees, even where there is no prospect of any residue, are entitled to administration *de bonis* in preference to legatees and annuitants. *Atkinson* v. *Barnard*, 2 *Phill. Rep.* 316. See *Thomas* v. *Butler*, 1 *Ventris*, 217. But residuary legatees for life, taking administration with the will annexed, were called on to give some security. *Friswell* v. *Moore*, 3 *Phill. Rep.* 139. The husband of a substituted residuary legatee is entitled to administration in preference to the husband of the sole executrix and residuary legatee for life: both parties being widowers. *Wetdrill* v. *Wright and others*, 2 *Phill. Rep.* 243. *Com. Dig. Administration* (B. C.). *Sparke* v. *Denne*, *Sir W. Jones*, 225.

ministration to whom he pleases, and consequently may insist upon such terms as he thinks reasonable. (1)

[281] Temporary administration, as during absence out of the kingdom.

12. There are also other administrations, which are not within the statutes aforesaid (*p*): As, administration during absence out of the kingdom. Concerning which, in the case of *Clare* and *Hedges*, *E.* 3 *W.* it was held clearly by the court, that such administration is grantable by law, and that it may be a great conveniency so to do; for if the next of kin be beyond sea, and such administration could not be granted, the debts due to the intestate might be lost. 1 *Lutw.* 342.

And in the case of *Slater* and *May*, *M.* 3 *An.* *Holt* chief justice said, that it was reasonable there should be such an administrator, and that this kind of administration stood upon the same reason as an administration during the minority of an executor, namely, that there should be one to manage the estate of the testator, till the person appointed by him is able. 2 *L. Raym.* 1071.

[By 38 *G.* 3. *c.* 87. At the expiration of twelve calendar months from the death of any testator, if the executors or executor to whom probate of the will shall have been granted, are or is then residing out of the jurisdiction of his majesty's courts of

(1) The right of a creditor is only this; he cannot be paid his debt till a representation to the deceased is made: he can then call on all who have a right to administer. Thus, also, if before an administration is granted a will be produced, the creditor has no right to contradict or deny it; for if there is a will, or a next of kin claims the administration, then a person offers to make himself a representative, and the creditor gets all he has a right to. 1 *Phill. Rep.* 177. The court does sometimes grant administration to more creditors than one; but it prefers that one should be fixed on. *Harrison and others* v. *All persons in general*, 2 *Phill. Rep.* 249. On a decree issuing to shew cause why administration should not be committed to *A. B.*, a creditor or legatee, *C. D.*, another creditor or person may be substituted on the appearance day, and administration may be granted to him. *Maidman* v. *All persons in general*, 1 *Phill. Rep.* 51. A creditor *in possession* of an administration may contest a suit against a person asserting himself to be next of kin; for the administration is not to be revoked on mere suggestion. *Elme* v. *Da Costa*, 1 *Phill. Rep.* 173. A creditor having administration may oppose a will produced without costs, as he might do, if opposed by next of kin. So where an executor, having probate, opposes a later will. *Anon.* per Sir *Edward Simpson*, 1 *Phill. Rep.* 160. Administration granted to a creditor was revoked, where having settled his own debt, he had gone away. *Jenkins*'s case, 3 *Phill. Rep.* 33.

(*p*) These administrations not being within the statute 21 *H.* 8. *c.* 5., the ordinary is not bound to grant them to the next of kin. See *Briers* v. *Goddard*. *Hob.* 250. *Thomas* v. *Butler*, 1 *Vent.* 219. and *Smith*'s case, *supra*, 2. and *infra*, 14.

law and equity, it shall be lawful for the ecclesiastical court which hath granted probate of such will, upon the application of any creditor, next of kin, or legatee, to grant a special administration as herein-after is mentioned; which administration shall be written or printed upon paper or parchment stamped only with one 5*s*. stamp, and shall pay no further or other duty to his majesty, his heirs or successors. § 1.

The party applying to the said court to grant such administration, shall make an affidavit in the following words, or to the effect following, *viz.*

"I *A. B.* of —— do swear that there is due and owing to me on bond or simple contract, [*or*, on account unsettled, *as the case may happen to be*, (*in which latter case he shall swear* to the best of his belief *only*,)] from the estate and effects of —— deceased, the sum of ——, and that *C. D.*, the only executor capable of acting, and to whom probate hath been granted, hath departed this kingdom, and is now out of the jurisdiction of his majesty's courts of law and equity, and that this deponent is desirous of exhibiting a bill in equity in his majesty's court of —— for the purpose of being paid his demand out of the assets of the said testator." 38 *G.* 3. *c.* 87. § 2.

And the administration to be granted pursuant to this act shall be in the form annexed to this section. *Id.* § 3.

by divine providence, archbishop of Canterbury, primate of all England and metropolitan, to our well-beloved in Christ greeting: Whereas it hath been alleged before the worshipful doctor of laws, surrogate of doctor of laws, master, keeper, or commissary of our prerogative court of Canterbury lawfully constituted by you the said that did, whilst living, and of sound mind, memory, and understanding, make and duly execute his last will and testament in writing, and did therefore nominate, constitute, and appoint, his executors, (*or* sole executor) who in the month of proved the said will by the authority of our said court, and now reside (*or* resides) out of this kingdom, and out of the jurisdiction of his majesty's courts of law and equity (as in and by an affidavit duly made and sworn to by and brought into and left in the registry of our said court, reference being thereunto had, will more fully and at large appear): And whereas the surrogate aforesaid, having duly considered the premises, did, at the petition of the said decree letters of administration of all and singular the goods, chattels, and credits of the said deceased, to be committed and granted to you the said named by or on the behalf of the said a creditor, (legatee) or (one of the next kin) of the said deceased [*as the case may be*,] limited for the purpose, to become and be made a party to a bill or bills to be exhibited against you in any of his majesty's courts of equity, and to carry the decree or decrees of any of the said court or courts into effect, but no further or otherwise (jus-

tice so requiring): And we being desirous that the said goods, chattels, and credits may be well and faithfully administered, applied, and disposed of according to law, do therefore, by these presents, grant full power and authority to you, in whose fidelity we confide, to administer, and faithfully dispose of the said goods, chattels, and credits, according to the tenor and effect of the said will limited as aforesaid, so far as such goods, chattels, and credits of the deceased will thereto extend, and the law requires, you having been already sworn well and faithfully to administer the same, and make a true and perfect inventory of all and singular the said goods, chattels, and credits, so far as the same may come to your hands, and to exhibit the same into the registry of our said prerogative court of Canterbury, on or before the next ensuing, and also to render a just and true account thereof: And we do by these presents ordain and constitute you administrator of all and singular the goods, chattels, and credits of the said deceased, limited as aforesaid, but no further or otherwise.

Given at London, the day of in the year of our Lord and in the year of our translation.

And the court of equity in which the suit is depending may, if needful, appoint any person to collect in any outstanding debts or effects due to such estate, and to give discharges for the same, such persons giving security in the usual manner duly to account for the same. 38 *G.* 3. *c.* 87. § 4.

The accountant-general of chancery, or the secretary or deputy-secretary of the bank of England, may transfer, and the bank may suffer a transfer to be made of any stock belonging to the estate of such deceased person into the name of the accountant-general, in trust for such purposes as the court shall direct in any suit in which the person to whom such administration hath been granted shall be a party; but if the executors capable of acting as such shall return to and reside within the jurisdiction of any of the said courts pending such suit, they shall be made parties to the suit, and the costs incurred by granting such administration and proceeding in such suit against such administrator, shall be paid by such person, or out of such fund as the court shall direct. *Id.* § 5. 281.]

And the authority of an administrator, appointed according to the provisions of this act during the absence of an executor from this country, does not become actually void upon the death of such executor, but is only voidable. (2) The administration is not for a *limited* period, but for a *limited* purpose: viz. to be made a party to suits in equity: and the effect of the return of the executor is, that he must be made a party in the usual course: and then the temporary administrator may account,

(2) *Taynton* v. *Hannay*, 3 *Bos. & Pul.* 26.

have his costs, and be discharged, but the proceedings had are not put an end to. (3)

13. Also, administration pending a suit; or, if there be no controversy, then until the executor comes in; which, as well as the last before mentioned, do fall of course, as soon as the consideration ceaseth upon which they were first granted. *Gibs.* 574. 2 *Bac. Abr.* 415. 2 *P. Will.* 576. (*q*) *Pendente lite.*

Nov. 23, 1749; *Knight* and *Duplessis*. The heir at law brought a bill to controvert the will, and moved for an injunction to stay the defendant from receiving the personal or the rents and profits of the real estate, and to have a receiver appointed, on the ground that there was a dispute in the ecclesiastical court concerning the probate; which not being yet granted there was none to get in the debts, therefore this court should appoint a receiver; and as to the real estate, the tenants will not pay the rents to any of the contending parties, so that they are in danger of being lost. By lord *Hardwicke*: This is a very early motion for a receiver; and no ground for it; nor the least colour as to the personal estate. For if the litigation in the ecclesiastical court is likely to be long, the court has jurisdiction to grant administration *pendente lite*, which administrator may maintain an action to recover the debts, whereby no loss can be to the personal estate. Nor is there any rule, that on a dispute in the ecclesiastical court concerning a probate, this court should appoint a receiver of the personal estate. 1 *Vesey*, 324. (4) [282]

14. An infant, how young soever he be, may be executor; yet the execution of the will shall not be committed unto him, until he attain the age of seventeen years; for administration During the minority of an infant executor

(3) *Raynsford* v. *Taynton*, 7 *Ves.* 460. 467. See *Slater* v. *May*, 2 *Ld. Raym.* 1071.

(*q*) And such administrator may maintain an action for recovering the debts due to the deceased. *Walker* v. *Woolaston*, 2 *P. Wms.* 576. *Willis* v. *Rich*, 2 *Atk.* 285.

(4) In *King* v. *King*, the court of chancery interfered by appointing a receiver. 6 *Ves.* 172. So in *Atkinson* v. *Henshaw*, 2 *Ves.* & *B.* 85. *Ball* v. *Oliver*, *id.* 96. But in *Richards* v. *Chave*, 12 *Ves.* 462., the court refused to interfere on the mere ground that two wills were in controversy in the spiritual court, and where no special case was made out, as that the property was in danger and could not be secured by administration *pendente lite*. Such an administrator may bring ejectments, *Wills* v. *Rich*, 2 *Atk.* 285. *Walker* v. *Woolaston*, 2 *P. Wms.* 576. 2 *Stra.* 917. His business is to collect debts; but he is not liable to interest for a balance in his hands during pendency of the suit in the ecclesiastical court; nor until a bill is filed, and he is called on to lodge it in court. *Gallivan* v. *Evans*, 1 *Ball* & *Beat. Rep.* 191. He has no authority to pay legacies; yet if paid *bona fide*, shall have credit for them. *Adair* v. *Shaw*, 1 *Sch.* & *Lef.* 254.

by administrator. granted *durante minore ætate* ceaseth, when the infant executor attains to the age of seventeen years. *Swin.* 331.

And Dr. *Swinburne* says, if it be a female infant, and married to a man of seventeen years of age or more, it is then as if herself were of that age, and her husband shall have the execution of the will and administration thereof. *Swin.* 331.

And in *Prince*'s case, 5 *Co.* 29., it is said to have been adjudged, that if administration is granted during the minority of a woman, and she takes a husband of age, the administration ceaseth; for that she hath a husband who may administer as executor.

But in the case of *Jones* and the *Earl of Strafford*, *M.* 1730., it was determined, that where administration is granted during the minority of an infant executrix under seventeen, and she marries a husband of full age; this doth not determine the administration. By *King* lord chancellor and *Raymond* chief justice. 3 *P. Will.* 88.

But although an administration during the minority of an infant *executor*, before 38 *G.* 3. *c.* 87. § 6., and 58 *G.* 3. *c.* 81. § 1., ceased at his age of seventeen years; yet an administration during the minority of an infant *administrator* ceaseth not until his age of twenty-one. As in the case of *Freke* and *Thomas*, *E.* 13 *W.* Debt upon bond brought by an administrator during the minority of an administrator. Upon demurrer to the declaration, exception for the defendant was taken, that it appeared upon the declaration, that he, during the minority of whom administration was granted to the plaintiff, was above the age of seventeen, and so the administration determined: that this case doth not differ in reason from the case of an administrator during the minority of an executor, which determines at the age of seventeen; nor from the case where a woman executrix under the age of seventeen marries a husband above the age of seventeen: for the only thing that the law considers is the ability of the person to administer the estate of the dead, who ought to have the administration of it, which ought to be the same in both
[283] cases; and in *Vaugh.* 98. the rule of averment of the age of an administrator or executor to be under seventeen, is equally put to both; and the statute of distribution will make no difference, because an infant may find sureties, though he cannot be bound himself. But not allowed: For by *Holt* chief justice, there is a difference between administration during the minority of an executor, and of another person; for an administrator during the minority of a residuary legatee, ought to be understood to be during his legal minority; for the authority that the administrator hath, is given to him by the statute; and an infant hath not been adjudged a legal person, to be intrusted with the management of an estate. But an executor, who comes in by the act of the party himself, hath been adjudged capable to administer at seventeen. But the law in the exposition of a statute will not

make such construction. And care is taken of the administration, by the commission of administration during his minority to his next friend. And this is the opinion of the civilians, and it hath been held accordingly by the commissioners delegate. And therefore judgment was given for the plaintiff. *L. Raym.* 667. (5)

And this is by construction of the statute of distribution, which requireth that the administrators shall enter into bond. 1 *Salk.* 39. And the like was determined in the case of *Atkinson* and *Cornish*, *E.* 10. *W. L. Raym.* 338. And afterwards, in the case of *Edmund* and *Shaler*, *T.* 7 *An.* wherein this distinction was taken, that the age of seventeen years allowed to be the age when an *executor* may take the executorship upon himself, is in conformity to the *spiritual* law, which allows an infant of seventeen years to be a proctor or agent for another; but *administration* is granted by the authority of the statute of the 31 *Ed.* 3. and therefore the person who has administration granted to him ought to be capable by the *common* law, by which the legal age is twenty-one, and, consequently, administration granted to another during his minority does not determine till his age of twenty-one years. *Comyns*, 159.

If an action be brought by an administrator during the minority of an executor, he must aver, that the executor is within the age of seventeen years, otherwise it is an error; but if an action be brought against such an administrator, there needs no such averment, because the plaintiff is a stranger to the defendant's power. *H.* 13 *J. Carver* and *Haslerigg*, *Hob.* 251.

There were two executors, and one of them was an infant; [284] and whether he must be joined in the action with the other as plaintiff, was the question: It was objected that he must not, because an infant cannot make a warrant of attorney; and if he could, he cannot instruct him. Adjudged, they may both sue by their attorney, because they both represent the person of the testator, and sue in the right of another, and therefore the infant must be joined with the other. *Foxwith* and *Tremain*, *H.* 21 & 22 *C.* 2. 1 *Mod.* 47. 1 *Sid.* 449. 1 *Ventr.* 102.

Where administration is granted during the minority of divers

(5) When the next of kin are in their infancy, as at 10 or 12 years old, the court assigns the guardianship *ex officio* without considering the infant's choice. When the minor is of age of discretion to elect, he is allowed to make a choice for himself, and the court will confirm his nomination; but, if he makes an improper choice, the court will control it, and expects the guardianship to be renounced by the next of kin. In *Ozeland* v. *Pole*, *Prerog. Hil. T.* 1787, Dr. *Calvert* held, that the choice of a minor of 20 years, no satisfactory reason being shewn why it should be controlled, ought to be admitted. *MSS. Cases*, 1.

executors; he that comes first of age shall prove the will, and the administration ceaseth. *Law of Test.* 473, 474.

So if one maketh two executors, one of the age of seventeen, and the other under; administration during the minority of him that is under age is void: because he that is of the age of seventeen may execute the will. 1 *Brownl.* 46.

And it is said, that the ordinary may grant administration during the minority of an infant to whom he pleases; for the next of kin, in respect to administrations, only concerneth the infant, and not the person who is employed for the infant until he comes of age. *Fitz-Gib.* 163. *Barnardist. Cha. Ca.* 22.

So in the case of *K.* and *Betteswortth, M.* 4 *G.* 2. a mandamus was moved for, to be directed to the judge of the prerogative court, to grant administration to one Smith, during the minority of his two infant grandchildren. The judge had approved of him as a proper person, but insisted on his giving security to distribute the effects in equal proportions amongst the creditors. The court were of opinion, that the judge had a discretionary power in granting administration *durante minore ætate*, and therefore that in this case he might insist upon reasonable or equitable terms, or otherwise refuse administration to the claimant. But they said, if a mandamus had been moved for, to grant administration generally, they would have granted it. 1 *Barnard.* 370. 425. [*S. C. supra*, 2.]

[By the 38 *G.* 3. *c.* 87. reciting that whereas inconveniences arise from granting probate to infants under the age of twenty-one; it is enacted, that *where an infant is sole executor*, administration, with the will annexed, shall be granted to the guardian of such infant, or to such other person as the spiritual court shall think fit, until such infant shall have attained the full age of twenty-one years, at which period, and not before, probate of the will shall be granted to him. And the person to whom such administration shall be granted, shall have the same powers vested in him as an administrator now hath by virtue of an administration granted to him *durante minore ætate* of the next kin. § 6, 7. Extended to Ireland by 58 *G.* 3. *c.* 81. § 1, 2.] (6)

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(6) See *D. of Leeds* v. *Munday*, 3 *Ves.* 348. 4 *Ves.* 149. *n.* Where there was an administration *durante minore ætate* of a property amounting to about 5000*l.*, and the minor on coming of age prayed administration of the unadministered residue of the estate (which was insolvent) as under 100*l.*, security was ordered to be given to the same amount that the administrator gave in the first instance for the whole of the goods and chattels of the deceased at the time of his death: and this for the sake of the creditors only, who are not affected by the stamp duties on the present value of the goods; for by 55 *G.* 3. *c.* 184. the second administration is taken on the same stamp with the

15. If a *feme covert*, as next of kin, hath a right to administer, the administration ought not to be granted to the husband and wife; for then if she should die before him he would continue administrator, against the meaning of the act. *Brown* and *Wood*, *H.* 23 *Car. Aleyn*, 36. *Style*, 74, 75.

Feme covert administratrix.

But it was said, that if it had been granted to them only during the coverture, perhaps it might be good; because, if granted to the wife only, the husband might, during the coverture, have administered. *Aleyn*. 36. [285]

If the wife, as residuary legatee, hath a right to take administration, but refuseth, and prays it may be granted to another, and not to her husband; yet it may be granted to her husband. *Vanthienen*'s case, *Fitz-Gibb.* 203.

For the husband may administer in right of his wife without her consent, but she cannot administer without the consent of her husband. *Black. Rep.* 801. *Thrustout* v. *Coppin.*

16. If an administrator die, his executors are not administrators, but it behoveth the ordinary to commit a new administration. 1 *Roll's Abr.* 907.

Administrator dying. [See p. 319.]

Where administration is granted to two, and one of them dies; the administration surviveth to him who is living. *Hudson* and *Hudson*, *T.* 1735. *Cas. Talb.* 127. (7)

17. If none of the kindred will take administration, then it shall be granted to those who shall desire it: And if none will take the administration, the ordinary may grant letters *ad colligendum bona defuncti*, and thereby take the goods of the deceased into his own hands, wherewith he is to pay debts and legacies, so far as the goods will reach; for which himself becomes liable in law, as other executors or administrators.

Where none will administer.

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first. *Abbott* v. *Abbott*, 2 *Phill. Rep.* 578. See lord *Mansfield*'s observation in *Archbishop of Canterbury* v. *House*, *infra*, 290., that no next of kin ever struggled for the administration of an insolvent estate with an honest view.

An administrator *durante minore ætate* cannot sue or be called to an account by any but the executor; for it is to him only that he is answerable for his administration; and where such an administrator is brought before the court without the executor, he may demur for that cause. *Fotherby* v. *Pate*, 3 *Atk.* 604. 606. He is in general a competent witness after the administration is determined, and may be examined as such for the executor both at law and in equity; for he is very little more than a person appointed *ad colligendum bona*, or an administrator *pendente lite*, who are always admitted as witnesses. S. C. 633. 605. But he is not a competent witness till he has accounted. S. C. *id.* 605.

(7) 1 *Atk.* 460. S. C. *Adams* v. *Buckland*, 2 *Vern.* 514. But in *Jacob* v. *Harwood*, 2 *Ves.* 268., the master of the rolls said, that the ecclesiastical court held it necessary, in the case of the death of one of two administrators, to come back for a probate on the death of one.

Swin. a. 448. [*Plowd.* 278. *Godolph. Orph. Leg. part* 2. *ch.* 30. § 8.]

[Where there are no kindred, as in case of intestate bastard.] [Where the deceased has no kindred, as when a bastard dies without issue, his personal estate belongs to the king, and his real escheats to the lord, *vide* **Bastards**, *III.* 2. But the usual course now is for some one to procure a grant of the former from the crown, to whom the ordinary grants letters of administration as of course.] (8)

May be granted out of the jurisdiction. 18. Letters of administration are not of necessity to be granted within the limits of the jurisdiction; the granting thereof being not a judicial, but a ministerial, and therefore not a local act; wherein the bishop acts, as a person designed and appointed by the law. *Gibs.* 478.

Cannot act before administration. 19. But an administrator cannot act before letters of administration granted to him. 1 *Salk.* 301.

But he may bring a bill in chancery; though this would be an exception in an action at law. *Barnardist.* 320.

Time of granting administration. 20. The practice is, not to issue letters of administration, until after the expiration of fourteen days from the death of the intestate; unless for special cause (as that the goods would otherwise [286] perish, or the like) the judge shall think fit to decree them sooner. 1 *Ought.* 323, 324.

Administrator's oath. 21. The oath to be made by the administrator, on his taking out letters of administration, is usually in this form: "You shall "swear, that you believe *A. B.* deceased died without a will; "and that you will well and truly administer all and every the "goods of the said deceased, and pay his debts so far as his "goods will extend; and that you will exhibit a true, full and "perfect inventory of the said goods of the deceased, and render "a true account of your administration into the —— court of "C. when you shall be thereunto lawfully required: So help "you God." 1 *Ought.* 323, 324.

Bond on granting administration. (*r*) 22. By the statute of the 21 *H.* 8. *c.* 5. In case any person die intestate, or the executors named in any testament refuse to prove the said testament; then the ordinary or other person having authority to take probate of testaments, shall grant the administration of the goods of the testator or person deceased;

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(8) *Jones* v. *Goodchild*, 3 *P. Wms.* 33. *Manning* v. *Napp.* 1 *Salk.* 37. In case of a bastard dying intestate, the crown takes administration *de jure*, while in case of a legitimate intestate, it can only take (having previously cited all persons having interest) in default of the non-appearance of any next of kin; for every legitimate is presumed to have next of kin, though unknown, and the nominee of the crown can only take administration as a trust *in usum jus habentium*, and cannot contest the right with any person claiming as next of kin, or contesting the nearness of kindred with one another.

(*r*) Vide *infra*, *Account*, 11.

taking surety of him or them to whom shall be made such commission, for the true administration of the goods, chattels, and debts, which he or they shall be so authorised to minister. § 3.

And by the statute of the 22 & 23 C. 2. c. 10. All ordinaries, as well the judges of the prerogative courts of Canterbury and York, as all other ordinaries and ecclesiastical judges, and every of them, having power to commit administration of the goods of persons dying intestate, shall and may upon their granting and committing of administrations of the goods of persons dying intestate, of the person or persons to whom any administration is to be committed, take sufficient bond, with two or more able sureties, respect being had to the value of the estate, in the name of the ordinary, with the condition in form and manner following, *mutatis mutandis, viz.*

" The condition of this obligation is such, that if the within bounden " *A. B.* administrator of all and singular the goods, chattels, and " credits of *C. D.* deceased, do make or cause to be made a true " and perfect inventory of all and singular the goods, chattels, and " credits of the said deceased, which have or shall come to the hands, " possession, or knowledge of him the said *A. B.* or into the hands " and possession of any other person or persons for him, and the " same so made do exhibit or cause to be exhibited into the registry [287] " of——— court, at or before the ——day of——next ensuing; " and the same goods, chattels, and credits, and all other the goods, " chattels, and credits of the said deceased at the time of his death, " which at any time after shall come to the hands or possession of " the said *A. B.* or into the hands and possession of any other person " or persons for him, do well and truly administer according to law; " and further do make or cause to be made a true and just account " of his said administration, at or before the ——day of——; and " all the rest and residue of the said goods, chattels, and credits " which shall be found remaining upon the said administrator's ac- " count, the same being first examined and allowed of by the judge " or judges for the time being of the said court, shall deliver and " pay unto such person or persons respectively, as the said judge or " judges, by his or their decree, or sentence, pursuant to the true " intent and meaning of this act, shall limit and appoint; and if it " shall hereafter appear that any last will and testament was made " by the said deceased, and the executor or executors therein named " do exhibit the same into the said court, making request to have it " allowed and approved accordingly, if the said *A. B.* within bounden " being thereunto required do render and deliver the said letters of " administration (approbation of such testament being first had and " made) in the said court; then this obligation to be void and of " none effect, or else to remain in full force and virtue."

Which bonds shall be good to all intents and purposes, and pleadable in any courts of justice. § 1, 2, 3.

H. 6 An. Archbishop of Canterbury and *Willis.* The condition of the bond, as to administering truly according to law, is to be

intended in bringing in his account, and not in paying the debts of the intestate; and therefore a creditor shall not take an assignment of the bond, and sue it, and for breach assign non-payment of a debt to him, or a *devastavit* committed by the administrator; for that would be endless. 1 *Salk.* 316.

June 28, 1745; *Greenside and others* against *Benson and others.* The plaintiffs were two sureties with the defendant Mrs. Hudson, in an administration bond given to the commissary of York, for her bringing in a true and perfect inventory of the intestate's effects. The defendant Mrs. Hudson did afterwards exhibit an
[288] inventory in the spiritual court of York. The defendant Benson, being a creditor of the intestate by bond in the penalty of 600*l.* brought an action against the defendant Mrs. Hudson upon that bond, and she pleaded that she had not assets above 54*l.* which she paid into court. The defendant Benson, not being satisfied with the inventory brought in by her, procured the commissary (by indemnifying him) to assign the administration bond to him, and he put it in suit by bringing three several actions, one against her, and one against each of the sureties; and assigned for breach of the bond, that she had not exhibited a true and perfect inventory. These causes came on to be tried, and on the trial no defence was made, and there was judgment for the plaintiff by default. A bill was brought against the defendant Benson, insisting that he as a creditor had no right to put the bond in suit against the sureties, and prayed an injunction to stay the proceedings at law. And for this was cited the case of the *Archbishop of Canterbury* and *Willis.* — By the lord chancellor *Hardwicke*: There is no doubt but the archbishop's commissary may assign a breach in not delivering a true and perfect inventory, and even without citation, and nothing else appears at law, and there must have been a judgment for the ordinary, because no doubt there was a breach in not exhibiting such an inventory. What the counsel for the plaintiffs and for Mrs. Hudson aim at would have been right, supposing the commissary had assigned for breach the non-payment of the creditor's debts. The ecclesiastical court understand no more by an account, than some account in nature of an inventory, and depends only upon the particular wording of inventories by administrators. The ordinary, after an administrator has exhibited an inventory, cannot compel the administrator to account, but it must be at the instance of the party, and therefore the inventory and account are as to the ordinary the same thing. What the defendant Mr. Benson asks is, that this bond upon which the penalty is recovered, may stand only as a security for what is justly due to the creditor. The administratrix, to be sure, cannot now dispute the verdict, which finds she did not administer the whole assets; and she is bound by a verdict which has unravelled a matter, and it is no excuse to say

that the verdict was without defence of the administratrix, for that is rather a consciousness that she had no defence. Therefore the court will not think it proper to have the whole account taken over again, or to alter what has been found by the verdict. [289]
The case of the sureties is not at all better: for, as the verdict was obtained against the administratrix, who was the proper person to try it, it would be hard to have this tried over again, in as many actions as the plaintiffs please. His lordship ordered an account to be taken only of what was exhibited upon the inventory, and the verdict to stand as a security for so much as that should fall short to satisfy the defendant's principal and interest on this bond. 3 *Atk.* 248.

T. 13 *G.* 2. *Folkes* and *Docminique*. The plaintiff declares on bond in the *detinet*, against the defendant as administrator during minority with the will annexed. And upon oyer, the condition appears to be, for exhibiting an inventory and duly administering by paying debts and legacies. The performance of all which the defendant avers. The plaintiff replies, that he had not paid a legacy of 1500*l.* though he had more than sufficient to pay all the debts, to wit, 500*l.* And on demurrer it was objected, that this was a void bond, not warranted by the statute of the 21 *H.* 8. *c.* 5. (nor by the statute of the 22 & 23 *C.* 2. *c.* 10. for neither of those statutes extendeth to administrators during the minority of an executor) nor yet by the common law; for that it requireth the administrator to pay legacies according to the ecclesiastical decision, and shall be taken to be obtained by coercion. On the contrary it was argued, that this, not being on an intestacy (nor in case where an executor refuseth), is not within the statutes, it is true; but it is to be supported as a reasonable bond taken by the course of the ecclesiastical court. And though formerly it was disputed, yet it is now settled, that they may compel distribution: that here the breach is assigned in non-payment of legacies, of which they have undoubted jurisdiction: and if it be good in any part (being a bond at common law) it is enough. And it differs from the case, where part of the condition is against a statute, for there it is void *in toto*. And by the court: these administrations are not within the statutes; and therefore we deny a mandamus: we must therefore consider it as a bond at common law; and then it is sufficient if it be good in that part on which the breach is assigned; as we think this is, and we cannot take it to be a bond by coercion. Therefore the plaintiff must have judgment. *Str.* 1137.

T. 14 *G.* 3. *Archbishop of Canterbury* and *House*. Upon a rule to shew cause, why the proceedings in an action upon an administration bond sued in the name of the archbishop shall [290]
not be stayed, with costs to be paid by the assignee of the archbishop; the grounds for staying the proceedings were, 1. That

in fact the assignee, who was a *creditor* only, had no authority from the archbishop. 2. That it was not competent to the archbishop to depute such authority to a creditor. ——— The counsel who shewed cause cited *Greenside* and *Benson*, 3 *Atk.* 248. as a case in point, that a creditor has a right to sue upon the administration bond. And with respect to the first point, it appeared clearly upon the affidavits, that the archbishop had given an authority to the plaintiff to sue in his name, and that the attorney for the defendant was fully apprised of it; though upon a personal application by the defendant's attorney, to know if such authority was granted, the secretary of the archbishop at first informed him that it had been refused, because Dr. *Ducarel* had advised the archbishop that it could not be granted to a creditor.— Lord *Mansfield:* No next of kin ever struggled for the administration of an insolvent estate with an honest view. What the object of the administratrix was in this case is very manifest upon the affidavits that have been read; namely, to sell the administration to the creditors. But failing of that purpose, after having obtained the administration, she makes use of all sorts of chicane, delay, and false pleas to defeat the creditors, and at length absconds. This is the general state of the case. At last a creditor or creditors have brought an action upon the administration bond in the name of the archbishop, and this is an application on the part of the administratrix to stay the proceedings in the name of the archbishop with costs; on two grounds, First, that it is not competent to the archbishop to authorise a creditor to put the bond in suit, but only the next of kin. Secondly, that the archbishop in his private capacity has not deputed such authority to the present plaintiff. With respect to the first point, let us see what it is which the act requires the archbishop or his ordinary to do: he is to grant administration, and to take bonds with condition that the administrators shall duly administer the intestate's effects: that they shall give an account of such their administration, and make an inventory of the goods and chattels, and that they shall pay the surplus to the next of kin. Now it is agreed, that if the next of kin is desirous of suing upon this bond, the court will direct the ordinary to permit his name to be used, because the next of kin is interested in the surplus. In
[291] like manner if such application is made by a creditor, I see no reason why he should not have the same privilege: and I know of no authority which says that the ordinary cannot impower him to put the bond in suit. On the contrary, it is *ex debito justitiæ* that he ought to do so; for though a creditor has no concern in the latter part of the condition, namely, the distribution of the surplus among the next of kin, yet he is most materially and principally interested in the administrator's delivering in a true inventory, and in the due administration of the effects. To one who has a *right* it is *ex debito justitiæ* to grant the liberty of

suing in the archbishop's name: to one who has no *right*, it is *ex debito justitiæ* to refuse it. As to the objection, that it is liable to be abused: if any bad use were made of it, the court would no doubt set aside the proceedings. But in the present case, there is no pretence or even suggestion of any abuse. And therefore I am clearly of opinion, that the plaintiff is well intitled to put the bond in suit. The next ground is, that the archbishop in his private person gave no such authority to the present plaintiff. I think a personal application to the archbishop was very improper; for it is not his personal affair: his name is used *officially* only; and therefore I am not surprised that the archbishop should not recollect what was requisite upon the occasion. He might refer it to Dr. Ducarel; and if Dr. Ducarel gave the answer that is stated, he was ill advised. If the case rested there, and the attorney had been misled by that answer, it would have operated differently as to the costs. But it is in evidence that he had the fullest information afterwards that the archbishop had authorized the plaintiff to sue in his name. And therefore I am of opinion, that the rule should be discharged with costs, to be paid by the attorney for the defendant. The other three judges concurred. *Cowp.* 140.

Fee for administration.

23. By the statute of the 21 *H.* 8. *c.* 5. The ordinary shall take nothing for letters of administration, unless the goods of the person deceased amount above the value or sum of 100*s.*; and in case the goods of the persons so deceased amount above the value of 100*s.*, and not above the value or sum of 40*l.*, he shall take only for the same 2*s.* 6*d.* and not above. § 4.

Here is no provision where the goods exceed the value of 40*l.*: which seemeth to have been an omission not intended. And in 2 *Roll.* 233. *Palm.* 318. a person was indicted because he took 10*s.* for letters of administration, against the form of the statute; but because the statute makes no provision in case the goods are above 40*l.*, (which was *casus omissus*), and the indictment did not set forth that they were under 40*l.*, and by consequence that the taking more than 2*s.* 6*d.* was extortion within the statute, [292] therefore it was adjudged to be ill, inasmuch as without that it could not appear to the court, whether he was punishable or not. *Gibs.* 485.

Other matters relating to the said fees are specified in the former part of this chapter, in treating of the fees for probate of wills (*s*); and the whole, more especially, under the title *Fees*. [For the fees for probate of wills and administration of the effects of seamen and marines, see *ante*, p. 227.]

Stamps.

24. For the amount of stamp duties to be paid on obtaining letters of administration, see *ante*, p. 269.]

(*s*) *Supra, Probate*, 24.

Letters of administration allowed as evidence.

25. The plaintiff could not produce any letters of administration; yet to prove himself administrator, he produced the original book of acts of the spiritual court, wherein there was an order entered, that administration shall be granted to him; and this was allowed to be good evidence. 1 *Lev.* 101. *Peasly's* case. *Elden* v. *Keddell*, 8 *East's R.* 187. (9)

And by the 4 *Ann. c.* 16. No advantage or exception shall be taken, for the default of alleging the bringing into court any letters of administration; but the court shall give judgment according to the very right of the cause, without regarding such omissions and defects, except the same shall be specially and particularly set down and shewn for cause of demurrer.

Revoking administration.

26. The ordinary cannot repeal an administration at his pleasure. *Swin.* a. 381.

H. 15 & 16 *C.* 2. *Sands's* case. Sir George Sands administered to his son, and afterwards a woman pretending to be his wife sued for a repeal, but a prohibition was granted; because the ordinary had an election to grant it either to the father or wife, and had executed his power by granting it to the father. *Raym.* 93.

[293] But where a *feme covert* died intestate, and the next of kin to her obtained administration, and the husband sued for a repeal, a prohibition was denied; because in this case the ordinary had no power or election, to grant it to any person but to the husband. 3 *Salk.* 22.

And the rule seemeth to be, that an administration may be repealed, although not arbitrarily, yet where there shall be just cause for so doing; of which the temporal courts are to judge: as, if the administrator should become lunatic, or the like. So if the next of kin, at the time of the death of the intestate, happen to be uncapable of administering, by reason of attaint, or excommunication; and the ordinary commits it to another; if he afterwards become capable, the ordinary may repeal the first administration, and commit it to the next of kin. *Gibs.* 479.

And the same thing is much more to be said, where the administration was undue *ab initio*, whether as granted to other than the next of kin, or granted by an incompetent authority, or in an irregular manner without citing those who ought to have been cited. *Gibs.* 479. 2 *Bac. Abr.* 410.

T. 5 *G.* 2. *Harrison* and *Weldon*. Walker Weldon died intestate, leaving Anne his wife, and Amphillis his sister. The sister upon the common oath, that she believed he died intestate without wife or children, obtained administration. And in a

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(9) An examined copy of such book has been so admitted in evidence. *Davis* v. *Williams*, 13 *East. Rep.* 232.

suit to repeal it as obtained by surprise, it appeared to be the course of the court never to grant it to the next of kin, until the wife is cited. The sister moved for a prohibition, and insisted that the ordinary had executed his authority. But the court held, that the ordinary could not be said to have executed his authority, having never had an opportunity to make the election which the statute of the 21 *H.* 8. *c.* 5. gives him; that it was incident to every court to rectify mistakes they were led into by the misrepresentation of the parties; that if there were no surprise (of which the court below was judge) there ought to be a prohibition, because then the administration will have been duly and regularly granted: but here was a plain surprise, and therefore they denied a prohibition. *Str.* 911.

And it is said, that an administration may be repealed, without any sentence of revocation to be given in any spiritual court or otherwise; as, by granting a new administration. 1 *And.* 330. *L. of T.* 476. (1)

[Bond to take possession of the effects of persons dying intestate abroad.]

It is common for persons resident in distant foreign settlements to enter into a bond to the directors or committee of the company trading there, conditioned to take possession of the effects of persons dying intestate in their settlements, and to sell the same and remit the produce to the company in Europe, in order that it may be delivered to the lawful administrator; and such a bond has been adjudged good in law. (2)

V. *Of the duty of executors and administrators in making an inventory, and getting in the effects of the deceased.*

1. At the time of probate or administration granted (3), it is required that the executor or administrator produce an inventory

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(1) In a case where the attornies of an executrix had withdrawn from the suit after propounding an alleged will, and had suffered a next of kin to take administration, it was held, under the circumstances, that the executrix was not barred from calling on the next of kin to bring in the administration, and re-propound the alleged will. *Trower and Smedley* v. *Cox*, 1 *Add. Rep.* 219. But the person in possession of an administration is not bound to propound his interest till the party calling in question the grant has first propounded and proved his own. *Dabbs* v. *Chisman*, and *Jennens* v. *Beauchamp*, 1 *Phill. Rep.* 155. *Hibben* v. *Calemberg*, *id.* 166.

(2) *The African Company* v. *Torrane*, 6 *T. Rep.* 588.

(3) The ancient practice of the prerogative court of Canterbury required an inventory to be exhibited before probate granted (see 21 *H.* 8. *c.* 5. § 4.); but that court will not now call for one *ex officio* except at instance of a party having a probable or contingent interest in the property. *Phillips* v. *Bignell*, 1 *Phill. Rep.* 239. *Sladen* v. *Salter*, cited *id.* 245. *Snow* v. *Strutt*, cited *id.* 241. *Myddleton* v.

of the goods, chattels, and credits of the deceased; and at the same time he maketh oath, that he will exhibit such (further) inventory into the court, as he shall thereafter be lawfully required to do.

And it is said, that if an executor, without making an inventory, shall intermeddle himself with the administration of the goods of the deceased (except in certain cases, as for the expences of the funeral, for insinuation of the testament, for making the inventory, for the necessary preservation of the goods), he shall be bound to answer to every one of the *creditors* his whole debt. *Swin.* 228, 229. *Athon,* 107.

Also it is said, that every *legatary* may recover his whole legacy at his hands: for in this case the law presumeth, that there are sufficient goods to pay all the legacies, and that the executor doth secretly and fraudulently subtract the same. Whereas otherwise, the executor is presumed not to have any more goods which were the testator's than are described in the inventory, the same being lawfully made. *Swin.* 228, 229. *Toth.* 183. 12 *Mod.* 346.

And therefore if any creditor or legatary doth affirm that the testator had any more goods than are comprised in the inventory, he must prove the same: otherwise the judge is to give credit to the inventory, being made in due form of law. *Swin.* 426.

And such executor is also further punishable at the discretion of the ordinary, by the constitution here next following: and therefore it concerneth the executor, that he do not administer the goods of the deceased, until he hath caused an inventory to

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Rushout, id. 244. And an executor hanging back was condemned in costs. 1 *Phill. Rep.* 239. The ancient practice is still retained in some country jurisdictions. 2 *Phill. Rep.* 240. Where a creditor gave in an allegation, pleading an omission in the inventory, to which the executrix put in a declaration instead of a specific answer, the court held, that such creditor was entitled to have a *constat* of the assets that had come to her hands, and admitted the allegation. *Barclay* v. *Marshall, id.* 188. In *Griffiths* v. *Bennett and another,* 2 *Phill. Rep.* 304., executrixes were pronounced contumacious in not bringing in the inventory at the instance of the residuary legatees, within a term after it was assigned.

[Inventory of administrator.] The court exercises a discretion as to the sort of inventory it requires from an administrator. *Reeves* v. *Freeling,* 2 *Phill. Rep.* 57. A person having an interest in the unadministered effects of an original testator, may call for an inventory and account without first taking a *de bonis* grant thereof; and representatives of a deceased administrator, though not at the same time representatives of the first testator, are liable to be called on for such inventory and account, on raising reasonable presumption that any part of the first testator's effects had got into their hands. *Ritchie* v. *Rees and Rees,* 1 *Add. Rep.* 158.

be made: for howsoever the act of him that is named executor is said to hold in law, before the proving of the will and the making of the inventory; nevertheless he that so presumeth to meddle and administer as executor before he maketh an inventory, is subject to ecclesiastical punishment: unless it be for doing such things as cannot be deferred till the inventory be made; as for intermeddling about the funeral, or disposing of such things as cannot be preserved by keeping, or such like. *Swin.* 424. [295]

Laws requiring the making an inventory.

2. By a constitution of *Othobon*, the executors of testaments before they shall intermeddle with the administration of the goods, shall make an inventory in the presence of some credible persons, who shall competently understand the value of the deceased's *goods*, and the same shall exhibit unto the ordinary; and if any shall presume to administer without such inventory made, he shall be punished by the discretion of his ordinary. *Athon*, 107.

And by a constitution of archbishop *Stratford*, it is ordered as follows: We do enjoin, that no executor of any testament shall be permitted to administer of the testator's *goods*, unless he first make a faithful inventory of the said goods; the funeral expences and the expences about the inventory only excepted. And the same inventory shall be delivered to the ordinary, within a time to be appointed by his discretion. *Lind.* 176.

And by the statute of the 21 *H.* 8. *c.* 5. The executor and executors named by the testator, or person deceased, or such other person or persons to whom administration shall be committed where any person dieth intestate, or by way of intestate, calling or taking to him or them such person or persons, two at the least, to whom the person so dying was indebted, or made any legacy; and upon their refusal or absence, two other honest persons, being next of kin to the person so dying; and in their default and absence, two other honest persons; and in their presence, and by their discretions, shall make or cause to be made a true and perfect inventory of all the *goods*, chattels, wares, merchandises, as well moveable as not moveable whatsoever, that were of the said person so deceased: and the same shall cause to be indented; whereof the one part shall be by the said executor or executors, administrator or administrators, upon his or their oath or oaths, to be taken before the said bishops or ordinaries, their officials or commissaries, or other persons having power to take probate of the testaments, to be good and true, delivered into the keeping of the said bishop, ordinary, or other person as aforesaid; and the other part thereof to remain with the said executor or executors, administrator or administrators. And no bishop, ordinary, or other whatsoever person having authority to take probate of testaments, on pain in this statute contained, shall refuse to take such inventory to him presented or ten-

dered to be delivered as aforesaid. § 4. [See *Henderson* v. *French*, *infra.*]

Swinburne says, if the executor enter to the testator's goods, and will make no inventory thereof, then may every legatary recover his whole legacy at his hands; for in this case the law presumeth, that there are sufficient goods to pay all the legacies, and that the executor doth secretly and fraudulently subtract the same: whereas otherwise the executor is presumed not to have any more goods which were the testator's, than are described in the inventory, the same being lawfully made. *Swin.* 228.

In the case of the *Corporation of Clergymen's Sons* against *Swainson*, Mar. 5, 1747; where the executors made no inventory, but paid interest for a legacy during their lives, it was decreed by the lord chancellor *Hardwicke*, that this shall be evidence of assets: and he would not put the plaintiffs to take a strict account of the assets of the testator, as there cannot now be a personal examination of the executors. And he said nothing is more necessary than to keep executors to deliver inventories. 1 *Ves.* 75.

And in the case of *Orr* and *Kaines*, March, 1750; where the executor paid several legacies in full, and died, having made no inventory, it was decreed by sir *John Strange* master of the rolls, that his representatives, having assets of the said executor, shall pay the rest. Not exhibiting an inventory (he said), which every executor ought to do, especially in a deficient estate, is an imputation upon him; and though not conclusive evidence, yet always inclines the court to bear harder upon an executor, because he may at any time relieve himself by an inventory, if he finds the estate deficient. He is admitted both at law on plea of *plene administravit*, and in equity on account of assets, to shew, that the money, for which by solemn inventory on oath he has charged himself, has by accident, as perhaps failure of some great merchant, not come to his hands; so that the inventory not being finally binding, is one reason why he ought to exhibit one. Besides, every executor ought, after debts and funeral expences, to see what remains for legatees; and if not enough for all, should make an estimate, and pay all in proportion: whereas in the present case, the executor having paid the rest in full, is the strongest evidence against him. The rule is, that whenever an executor pays a legacy, the presumption is, he hath sufficient to pay all legacies; and the court will oblige him, if solvent, to pay
[297] the rest, and not permit him to bring a bill to compel the legatee, whom he voluntarily paid, to refund: although if the executor proves insolvent, so that there is no other way, the court will admit a bill by the other legatees to compel that legatee to refund. But that is not the case here; for the executor appears to have been solvent; and he hath acted so, as that the court

will presume him to have received assets sufficient for all the legacies. 2 *Ves.* 193. (4)

3. By *goods* in the aforesaid constitutions and statute are included all the testator's cattle, as bulls, cows, oxen, sheep, horses, swine, and all poultry, household stuff, money, plate, jewels, corn, hay, wood severed from the ground, and such like moveables. *Law of Test.* 379. **Things to be put into the inventory. (5) Goods.**

4. *Chattels* comprehend all goods, moveable and immoveable; except such as are in nature of freehold, or parcel of it. And chattels are either *personal* or *real; personal* are such as belong immediately to the person of a man, and for which, if they be any way injuriously withheld from him, he hath no other remedy but by personal action; chattels *real* are such as either appertain not immediately to the person, but to some other thing by way of dependency, as a box with charters of land; or such as are issuing out of some immoveable thing, as a lease, or rent for term of years: and chattels real concern the realty, lands and tenements, interest in advowsons, in statutes merchant, and the like. 1 *Inst.* 118. **Chattels.**

But *fishes* in a pond, *conies* in a warren, *deer* in a park, *pigeons* in a dove-house, where the testator had the inheritance, or but for life, in the pond, warren, park, and dove-house, are not chattels at all, nor go to the executor, but to the heir with the inheritance: and therefore they are not to be put in the inventory of the goods and chattels of the party deceased. *Went.* 52. *Swin.* 422. But if the testator have any tame pigeons, deer, rabbits, pheasants, or partridges, they shall go to the executors; and though they were not tame, yet if they were kept alive in any room, cage, or such like place; so fish in a trunk; also young pigeons, though not tame, being in the dove-house, and not able to fly out. *Law of Test.* 379.

Also *hounds*, *greyhounds*, *spaniels*, and the like, as they may be

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(4) An executrix in custody under an *excomm. cap.* for not appearing to a creditor's citation to exhibit an inventory, moved for a *supersedeas*, disputing the debt upon equitable grounds; but the motion was refused, as tending to destroy the jurisdiction of the ecclesiastical court. *The King* v. *Blatch*, 5 *Ves.* 113. The equitable demand of an administratrix against the personal estate of her intestate, will hinder the next of kin from proceeding in the spiritual court to compel distribution; but they may proceed to compel the administratrix to exhibit an inventory. *Backhouse* v. *Hunter*, 1 *Cox. Rep.* 342.

(5) See the form of an inventory, *infra*, 491. An executor need not insert in the inventory articles of which he did not come into possession by testator's death, but which were obtained before it by other means. *Per* sir *W. Wynne*, *Booth* v. *Panton*, *Mich. T.* 1788, *Prerog. MSS. Cas.* 14.

valuable, and may serve not only for delight, but for profit, shall go to the executors. *Law of Test.* 379.

Debts owing by the deceased. 5. *Debts which the deceased owed to others,* ought not to be put in the inventory; because they are not the goods of the deceased, but of other persons. *Lind.* 176. Yet they may be put

[298] in, if it shall seem expedient. *Id.* —— And this the rather, in case the clear value of the goods and chattels (the debts owing by the deceased being deducted) shall not exceed the sum of 40*l.*; thereby the better to ascertain the mortuary.

And if these debts shall be put into the inventory; the ordinary shall do well to make diligent examination, whether the testator did owe any such; that thereby the legataries, and children of the deceased, and others, may not be defrauded of their just due, by any false pretence thereof. *Swin.* 423.

Debts owing to the deceased. 6. *Lindwood* says, that *debts owing to the deceased,* of which there is not any *writing or obligation,* ought not to be put into the inventory before they be received; because, before that, they are not found to be debts, at least so as they may be handled or taken hold of. But afterwards when such debts are received, they ought to be put into the inventory as goods newly accruing. *Lind.* 176.

But unless they be bad debts, it seemeth best to insert them; and even if they be bad debts, or desperate, yet they may be inserted, specifying them as such. And if in the course of administration they shall be recovered, then they shall be accounted for in like manner as the rest of the personalty; and if they cannot be recovered, or so much of them as cannot be recovered, shall not be accounted for as any part of the goods of the deceased.

Leases. 7. All *leases* for years the executor shall have; and therefore leases ought not to be omitted forth of the inventory. 1 *Roll's Abr.* 915. *Swin.* 421.

If a devise be of land to one and the heirs of his body for 500 years; this is a lease for years, and therefore the executor shall have it; and the reason is, because an estate tail cannot be made of a term. 1 *Roll's Abr.* 915.

Estates *pur auter vie.* 8. Estates *pur auter vie,* that is, estates held by lease during the life of another person, ought also to be put into the inventory: the same being made distributable by the statute of the 14 *G.* 2. *c.* 20. (*t*)

[299] Extent. 9. Also the executor shall have all lands *extended* on any judgment, statute, or recognizance. *Law of Test.* 378.

(*t*) Before this statute, such estates were only assets for payment of debts by 29 *C.* 2. *c.* 3., but not of legacies, except particularly derived thereout, nor were they distributable, and therefore they needed not be put in the inventory. *Oldham* v. *Pickering.* 2 *Salk.* 464. As to these estates, *vid.* *supra. Of what things.*

10. Also the executor shall have all arrearages of *rent* due at the death of the testator; and therefore the same shall be put in the inventory. *Law of Test.* 378. Rent.

11. *Corn* growing upon the ground ought to be put into the inventory; seeing it belongeth to the executor: but not the grass or trees so growing; which belong to the heir, and not to the executor. *Swin.* 421. Corn or other things growing.

Also *hops,* though not sown, if planted; and *saffron,* and *hemp,* because sown; shall go to the executors. *Law of Test.* 380.

But Mr. *Wentworth* thinks, that *roots* in gardens, as carrots, parsnips, turnips, skirrets, and such like, shall not go to the executor, but to the heir; because they cannot be taken without digging and breaking the soil. *Went.* 61, 62.

But lord *Coke* says, that if the testator shall set roots, his executors shall have that year's crop. 1 *Inst.* 55.

If a man be seised for life or in fee or tail in his own right, or in the right of his wife, or for years in the right of his wife, and sows the ground with corn, but dies before it is ripe; his executors shall have it, and not the wife or heir: but grass ready to be cut for hay, apples, pears, and other fruit on the trees, shall not go to the executors. And the reason of the difference is, because the former comes not merely from the soil, without the industry or manurance of man, as the latter doth. *Law of Test.* 379.

Yet if a lessee at will sows the land with *hay-seed,* and by this increases the grass, and the lessor enters and ejects him; the lessee shall not have it. 1 *Inst.* 56.

But for *clover, saint foin,* and the like, the reason of manurance, labour, and cultivation, is the same as for corn; but no case hath occurred, wherein these matters have come in question, this kind of husbandry having been in use only of late years.

If the wife had a lease for years as executrix, and the husband sows the ground with corn, and dies before it is ripe; the corn shall go to his executors, at least so much as is more than the yearly rent of the land: but if the husband and wife were joint tenants of the land; she shall have the corn, and not his executors. *Law of Test.* 380.

If a parson sows his glebe land, and dies before severance; and [300] after, his successor is admitted, instituted, and inducted before the corn is cut: it shall go to the executors or administrators of the deceased, who must pay tithes thereof to the successor. 1 *Roll's Abr.* 655.

12. Things that are affixed to the tenement, and are made parcel of the freehold, ought not to be put in the inventory; because these belong to the heir, and not to the executor. *Swin.* 421. Things affixed to the freehold.

And therefore the *glass* annexed to the windows of the house,

because they are parcel of the house, shall descend as parcel of the inheritance to the heir, and the executors shall not have it. And although the lessee himself at his own cost do cause the glass to be put into the windows, yet the same being parcel of the house, he cannot take the same away afterwards, without danger of punishment for waste. Neither is there any material difference in law, whether the glass were annexed to the window with nails, or in other manner, either by the lord or by the tenant; for being once affixed to the freehold, the same cannot be removed by the lessee, but shall belong to the heir, and not the executors: and therefore the same is not to be put into the inventory, as part or parcel of the goods of the deceased. *Swin.* 421.

The like may be concluded of *wainscot;* that it ought not to be put into the inventory, as parcel of the goods of the deceased: for being annexed unto the house, either by the lessor or by the lessee, it is parcel of the house. And there is no difference whether it be affixed with great nails, or little nails, or by screws, or irons thrust through the posts or walls of the house; for howsoever it be affixed, either in manner aforesaid, or in any other manner, it is parcel of the freehold; and if the executors shall remove it, they are punishable for the same. *Swin.* 421.

And not only glass and wainscot, but any other such like thing, affixed to the freehold, or to the ground, with mortar and stone, as *tables dormant*, *leads*, *mangers*, and such like; for these belong to the heir, and not to the executor: and therefore they are not to be put in the inventory of the deceased's goods. *Swin.* 421.

So also of *mill-stones*, *anvils*, *doors*, *keys*, *window-shutters;* none of these be chattels, but parcel of the freehold, or thereto pertaining; and therefore shall not go to the executors. *Went.* 61.

An executor taking away a *furnace*, which was set in the mid-
[301] dle of an house, and not fixed to any wall; the heir brought an action of trespass against him: and it was adjudged for the heir, that this should go as part of the freehold and inheritance of the heir. But in the case of *Day* and *Austin*, *Walmsley* said, that lord *Dyer*'s opinion was, that where the furnace is not affixed to the wall, the lessee might within his term take it away; but not if it was fixed to the wall, for there it would strengthen the house. *Law of Test.* 380.

Pictures and *glasses*, though, generally speaking, not part of the freehold, yet if put up instead of wainscot, or where otherwise wainscot would have been put, shall go to the heir; for the house ought not to come to the heir maimed or disfigured. 2 *Vern.* 508. *Law of Test.* 380, 381.

But in the case of *Harvey* and *Harvey*, *M.* 14 *Geo.* 2. In trover by the executor against the heir: it was held by *Lee*

chief justice, that *hangings, tapestry,* and *iron backs* to chimnies, belong to the executor; who recovered accordingly against the heir. *Str.* 1141.

And the law seemeth now to be held not so strict as formerly; and if these things can be taken away without prejudice to the fabric of the house, it seemeth that the executor shall have them: as tables, although fastened to the floor; furnaces, if not made part of the wall; grates, iron ovens, jacks, clock cases, and such like, although fixed to the freehold by nails or otherwise. [A granary built on pillars in Hampshire is by custom a chattel, and belongs to the executor. (6)]

Dec. 14. 1743; *Lawton* and *Lawton.* The question was whether a *fire engine* set up for the benefit of a *colliery* by a tenant for life, shall be considered as personal estate, and go to his executor, or fixed to the freehold, and go to a remainder man. For the plaintiff (who was a creditor of the tenant for life) evidence was read to prove that the fire engine was worth, to be sold, 350*l.*; and that it is customary to remove them; and that in building of sheds for securing the engine, they leave holes for the ends of timber, to make it more commodious for removal, and that they are very capable of being carried from one place to another. And it was argued, that the testator was dead greatly indebted; and it would be hard, when he has been laying out his creditors' money in erecting this engine, that they should not have the benefit of it, but that the strict rule of law should take place. And it was compared to the case of a cyder mill, which is let in very deep into the ground, and is certainly fixed to the freehold; and yet lord chief baron *Comyns,* at the assizes at Worcester, upon an action of trover brought by the executor against [302] the heir, was of opinion, that it was personal estate, and directed the jury to find for the executor. On the other hand, for the defendant, evidence was produced to shew, that the engine cannot be removed without tearing up the soil, and destroying the brickwork. By the lord chancellor *Hardwicke:* This is a demand by a creditor of Mr. Lawton, who set up the fire engine, to have the fund for payment of debts extended as much as possible. 'Tis true, the court cannot construe the fund for assets further than the law allows; but they will do it to the utmost they can in favour of creditors. This brings on the question of the fire engine, whether it shall be considered as personal estate, and consequently applied to the increase of assets for payment of debts. Now it appears in evidence, that in its own nature it is a personal moveable chattel, taken either in part, or in gross, before it is put up. But then it is insisted, that fixing it in order to make it work, is properly an annexation to the freehold. To be sure in

(6) 11 *Vin. Ab.* 154.

the old cases, they go a great way upon the annexation to the freehold; and so long ago as Henry the seventh's time, the courts of law construed even a copper and furnaces to be part of the freehold. Since that time, the general ground the courts have gone upon, of relaxing this strict construction of law is, that it is for the benefit of the public to encourage tenants for life to do what is advantageous to the estate during their term. What would have been held to be waste in Henry the seventh's time, as removing wainscot fixed only by screws, and marble chimney pieces, is now allowed to be done. Coppers and all sorts of brewing vessels cannot possibly be used, without being as much fixed as fire engines; and in brewhouses especially, pipes must be laid through the walls, and supported by walls; and yet, notwithstanding this, as they are laid for the convenience of the trade, landlords will not be allowed to retain them. This being the general rule, consider how the case stands as to the engine which is now in question. It is said, there are two maxims which are strong for the remainder man: *First*, that you shall not destroy the principal thing, by taking away the accessary to it. And this is very true in general, but doth not hold in the present case; for the walls are not the principal thing, as they are only sheds to prevent any injury that might otherwise happen to it. *Secondly*, it has been said, that it must be deemed part of the estate, be-
[303] cause it cannot subsist without it. Now collieries formerly might be enjoyed before the invention of engines; and therefore this is only a question of *majus* and *minus*, whether it is more or less convenient for the colliery. There is no doubt but the case would be very clear as between landlord and tenant. It is true, the old rules of law have indeed been relaxed chiefly between landlord and tenant, and not so frequently between an ancestor and heir at law, or tenant for life and remainder man. But even in these cases, it admits the consideration of public conveniency for determining the question. I think, even between ancestor and heir, it would be very hard that such things should go in every instance to the heir. One reason that weighs with me is, its being a mixed case between enjoying the profits of the land, and carrying on a species of trade; and considering it in this light, it comes very near the instances in brewhouses of furnaces and coppers. That case also of the cyder mill, between the executor and the heir, is extremely strong; for though cyder is part of the profits of the real estate, yet it was held by lord chief baron *Comyns*, a very able common lawyer, that the cyder mill was personal estate notwithstanding, and that it should go to the executor. It doth not differ it in my opinion, whether a shed over such an engine be made of brick or wood; for it is only intended to cover it from the weather and other inconveniences. This is not the case between an ancestor and an heir, but an intermediate

case between a tenant for life and remainder man. The reason of the thing weighs most in favour of the tenant for life; and is like the case of corn growing, which shall go to the executor, and not to the heir or remainder man, it being for the benefit of the kingdom that corn should be sown. It is very well known, that little profit can be made of coal mines without this engine; and tenants for life would be discouraged in erecting them, if they must go from their representatives to a remote remainder man, when the tenant for life might possibly die the next day after the engine is set up. These reasons of public benefit and convenience weigh greatly with me, and are a principal ingredient in my present opinion. Upon the whole, I think this fire engine ought to be considered as part of the personal estate of Mr. Lawton, and go to the executor for the increase of assets. And decreed accordingly. 3 *Atkyns*, 13.

13. But if a man be seised of a house, and possessed of divers heir-looms, that by custom have gone with the house from heir to heir, it seemeth that these, although no part of the freehold, shall go to the heir, and not to the executor; and therefore ought not to be put into the inventory. 1 *Inst.* 185. **Heir-looms.** [304]

So if an incumbent enter upon a parsonage-house, in which are hangings, grates, iron backs to chimnies, and such like, not put there by the last incumbent, but which have gone from successor to successor; the executor of the last incumbent shall not have them, but it seemeth that they shall continue in the nature of heir-looms: but if the last incumbent fixed them there only for his own convenience, it seemeth that they shall be deemed as furniture, or household goods, and shall go to his executor.

14. Writings and evidences, which touch the inheritance, shall go to the heir, and not to the executor. *Went.* 62.

And *Swinburne* says, that a box ensealed, or the chest with evidence of the land, though the same be not affixed to the freehold, yet because they contain those things which belong to the heir, they also belong to the heir, and not to the executors; and therefore they are not to be put into the inventory of the deceased's goods. *Swin.* 421. **Boxes with writings.**

But as to this, *Rolle* makes a distinction, and saith, if the writings which concern the inheritance are in a chest, the executors shall have the chest, and the heir the writings. But if the chest be shut, the heir shall have the chest also; but if it be not shut, the executor shall have the chest. 1 *Roll's Abr.* 915.

But the author of the *Law of Testaments* observeth, that this distinction seemeth not to be well taken; for if it be a box purposed for the keeping of the deeds, the heir ought to have it, whether locked or open: on the other hand, if it be a box designed for other use, as for the keeping linen, it cannot be said to be appurtenant to evidences, although some be in it, for so

may other things also; or perhaps it may be a chest or cabinet of great value: surely this shall not go to the heir, when perhaps there is not personal estate sufficient to pay the testator's debts. *Law of Test.* 381.

If a further distinction seemeth necessary, it might be this: that if the executor will not open the box, and deliver the writings, the heir, rather than not have the writings may take the box also; but if the executor will deliver the writings, and retain the box, it doth not seem that one box more than another can be
[305] said to be appurtenant to writings, so as to divest the property thereof out of the executor.

Profits of lands to be sold.

15. By the 21 *H.* 8. *c.* 5. § 5. If the person deceased shall devise any lands, tenements, or hereditaments, to be sold, neither the money thereof coming, nor the profits of the said lands for any time to be taken, shall be accounted as any of the goods or chattels of the said person so deceased.

Wife's paraphernalia. (*u*)

16. But what shall we say to those goods which may seem to belong to the wife rather than to the husband, as her apparel, her bed, her jewels, or ornaments for her person; whether are they to be put into the inventory of the husband's goods, yea or nay? By the civil law, those belonging to the wife, which be called *bona paraphernalia*, are not to be put into the inventory of her husband's goods, neither are they subject unto the payment of the husband's debts: but whether the wife's apparel, with her bed, jewels, and ornaments for her person, be comprehended amongst those goods which the law calleth *bona paraphernalia*, is the matter in question. And it seemeth rather that they are not (saith *Swinburne*); her convenient apparel, agreeable to her degree, only excepted. Otherwise, whatsoever goods belong to the wife, are presently by virtue of the marriage become the husband's, the property thereof being changed and transferred from the wife to the husband. Insomuch that without her husband's licence or consent, she cannot dispose thereof, neither by act in her lifetime, nor at her death by her last will, which she might do if they were *bona paraphernalia;* wherefore those goods being the husband's and not the wife's and the property thereof being in him, and not in her, it may be concluded, that in construction of law, those goods above mentioned, and namely, the wife's jewels, chains, and borders, are to be put into the inventory of the deceased husband's goods. *Swin.* 422.

Rolle says, the wife after the death of her husband shall have convenient apparel for her body, and not the executors of her husband; and of this convenience the court must be the judge. But she shall not have excessive apparel: and if she takes more than is convenient, she shall be taken to be an executor of her own wrong. 1 *Roll's Abr.* 911. *Law of Test.* 383, 384.

(*u*) See Marriage, II. 1. *ante*, 71. note (2).

And if the husband deliver to his wife a piece of cloth for to make a garment, and dieth; although that this was not made into a garment in the life of the husband, yet the wife shall have [306] this, and not the executor of the husband; inasmuch as it was delivered to her to this intent: but against the debtee of the husband, the wife shall have no more apparel than is convenient. 1 *Roll's Abr.* 911.

But in the case of *Hastings* and *Douglas*, *H.* 9 *Cha.* A chain of diamonds and pearl, worth 370*l.*, usually worn by sir John Davis's wife, who was daughter of the earl of Castlehaven, being by her husband's will devised from her; *Berkeley* and *Jones* were of opinion, that she being the daughter of a nobleman, and permitted to use them frequently as ornaments of her person, and they being convenient for her degree, she should have them as her paraphernalia; and when there are not debts to be paid (as it doth not appear that there are any in this case), she shall have them against the executors or administrators of her husband, and the husband cannot dispose of them from his wife by his will; but instantly by his death, the possession of them being in the wife's custody, the property is vested in her, and the husband cannot give them away; for it is not reasonable the husband should leave her naked of those jewels which she usually did wear, and are fit according to her calling to wear. But *Richardson* and *Croke* were of opinion, that the will was good, and that she may not take them contrary to the devise; but if the husband had not made his will of them, but had left them to the disposition of the law, and the question had been betwixt the executor or administrator and the wife, where there be not any debts or legacies to be paid, or where there be assets to pay all debts and legacies besides those jewels; there, peradventure, the law will allow her to take, and to enjoy them as her paraphernalia. *Cro. Car.* 343. 1 *Roll's Abr.* 911.

But in the case of *Carey* and *Appleton*, *M.* 26 *C.* 2., the husband devised the jewels, which were the paraphernalia of the wife, and died: They were decreed to the wife. 1 *Cha. Ca.* 240.

And by *Macclesfield* lord chancellor: *Bona paraphernalia* are not devisable by the husband from the wife, any more than heirlooms from the heir: so that the right of the wife to her paraphernalia is to be preferred to that of a legatee. 1 *P. Will.* 730.

But it is said, that *bona paraphernalia* shall not be retained by the wife against *debts*. And in the case of *Stubbs* and *Stubbs*, *H.* 31 *C.* 2., it was held, that where the real estate is chargeable, together with the personal, for the payment of debts, and the [307] personal estate is deficient, the *bona paraphernalia* shall be liable before the real estate shall come in. *Cha. Ca. Finch.* 415. (7)

(7) So in *Grey* v. *Grey*, *Lord Nort. MSS.* 2 *Swanst. Rep. Ap.* 602.,

But in the case of *Tipping* and *Tipping*, *M.* 1721, by *Macclesfield* lord chancellor: *Bona paraphernalia* are liable to debts in favour of creditors only, and not in favour of the heir at law. 1 *P. Will.* 730.

And if creditors of the testator by judgment take the jewels after his death in execution, when the heir, or executor, or trustees, have other assets sufficient to pay such debts; this is a default in the trustee, for which the widow ought not to suffer as to her *bona paraphernalia*. 2 *P. Will.* 80.

And in *Northey* and *Northey*, Dec. 6, 1740, lord *Hardwicke* said, that the late cases have gone so far in the point of paraphernalia, that they have considered a wife in the nature of a creditor, and as having a lien upon real estate. Though the jewels in the present case were worth 3000*l.*, yet (he said) the value makes no alteration: and that there are several cases where there have been debts standing out against the husband, and yet the wife has been admitted as a creditor to the value of the paraphernalia, even upon trust estates created for payment of debts. 2 *Atk.* 78, 79.

And in the case of *Incledon* and *Northcote*, Mar. 2, 1746, it was said by lord *Hardwicke*, that where there is a trust estate, charged with payment of debts, which is sufficient for that purpose, she may come round upon the trust estate to be reimbursed to the value of her paraphernalia, if the personal has been exhausted by her husband's creditors. And so it hath been determined in several cases. 3 *Atk.* 438. (*x*)

And in *Snelson* and *Corbet*, June 16, 1746, where the question was, whether paraphernalia shall be liable to the payment of simple contract creditors and legacies; lord *Hardwicke* said, at law, where the husband dies indebted, the widow cannot have her paraphernalia; but this court doth not determine so strictly: for if the personal estate hath been exhausted in payment of specialty creditors, she shall stand in their place as to so much upon the real assets of the heir at law; for she has a prior right, and a superior one to legatees, who take only from the bounty of the testator 3 *Atk.* 369.

[308] Also if an husband pledges the wife's paraphernalia, and dies leaving a sufficient estate to redeem the pledge and pay all his debts; she shall be intitled to have it redeemed out of the husband's personal estate.—— But the husband may alienate the same in his lifetime. 3 *Atk.* 394, 395.

Also where a daughter's *portion* was to be paid out of her

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the title to paraphernalia was not allowed to prevail against a son claiming for the benefit of creditors; and on such a claim the court cannot consider the quality of the party.

(*x*) See *Boynton* v. *Parkhurst*, 1 *Bro. C. C.* 576.

father's personal estate; the court would not allow the widow to retain her paraphernalia. *Cha. Ca. Finch*, 146.

And where by *marriage articles* it was agreed, that the wife should have no part of the husband's personal estate, but what he should give her by his will; it was declared by the court, that this bars her of her paraphernalia, and from jewels given to her by her husband in his lifetime. 2 *Vern.* 83. (*y*)

Yet notwithstanding all that hath been said, if we shall respect what hath been used and observed, such hath ever been the general and ancient custom or rather courtesy of the province of York, as thereby widows have been tolerated, to reserve to their own use, not only their apparel, and a convenient bed, but a coffer with divers things therein necessary for their own persons: which things have been usually omitted out of the inventory of their deceased husband's goods, unless peradventure the husband was so far indebted, as the rest of his goods would not suffice to discharge the same; in which case the wife's jewels, chains, and borders, and such like, being things of decency or ornament, and not of necessity, have been usually prized and put into the inventory amongst other goods of the deceased, towards the payment of his debts; and so they ought to be. *Swin.* 422.

Wife's goods or chattels.

17. Goods to which the husband is intitled in right of his wife, and as administrator to her, are not to be put in the inventory after her death; but things which are in action must be put in. *Swin.* 422. *God. O. L.* 153.

In the case of *Sir John St. John, T.* 15 *Cha.*, the lady C. was possessed of divers leases, and conveyed them in trust, and afterwards married with A. B. The lady received the money upon the leases, and with part of the money bought jewels, and other part of the money she left and died. A. B. takes letters of administration of the goods of his wife; and in a suit of the ecclesiastical court, the court would have compelled him to have given an account of the jewels, and for the monies, to have put [309] them into the inventory. But the opinion of the whole court of king's bench was, that he should not put them into the inventory; because the property of the jewels was absolutely in him as husband, and he had them not as administrator: but such things as be in action, and which he shall have as administrator, he shall be accountable for, and they shall be put into the inventory. And for the money received upon trust, it was resolved that the same was the money of the trustees, and the wife had no remedy for it but in equity; and therefore the husband shall have it as administrator. And in that case it was resolved, that if a woman do convey a lease in trust for her use, and afterwards

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(*y*) S. P. *Reed* v. *Snell*, 2 *Atk.* 642.

marrieth, in such case it lieth not in the power of the husband to dispose of it; and if the wife die, the husband shall not have it. *Mar.* 44. *Swin.* a. 423.

Valuation.

18. By the aforesaid constitution of *Othobon*, the inventory shall be made in the presence of some credible persons, who shall *competently understand the value of the deceased's goods*: for it is not sufficient to make an inventory, unless the goods therein contained be particularly valued and appraised by some honest and skilful persons, to be the just value thereof in their judgments and consciences; that is to say, at such price as the same may be sold for at that time. *Swin.* 425, 426.

But as to the value of the goods upon the appraisement, it is not binding, nor very much regarded at the common law; for if it is too high, it shall not be prejudicial to the executor or administrator; and if it be too low, it shall be no advantage to him: but the very value found by the jury, when it comes in question whether the executor hath fully administered, or hath assets or not, is that which is binding. *Swin.* 426. *Went.* 83, 84.

In what cases an inventory may be dispensed withal.

19. By the aforesaid constitution of archbishop *Stratford*, the inventory shall be *delivered to the ordinary, within a time to be appointed by his discretion.*——Not arbitrarily (saith *Lindwood*) but in a reasonable manner, according to the exigency of persons, things, and places. *Lind.* 177.

And as the time for exhibiting such inventory is left to the discretion of the ordinary; so may he remit the making of an inventory, for a reasonable cause: as where it may be expedient, that the quantity of the goods should not be divulged. *Lind.* 176.

As was done in *Boon's* case, July 18, 1682. Who dying pos-
[310] sessed of a large personal estate, made his eldest son executor; and among other bequests, gave his second son 2000*l.*, to be paid at three several payments. The said second son took out process against the elder brother, and caused him to be cited before the judge of the prerogative court (where the will was proved) in order to compel him to bring in an inventory. But it appearing to the judge, that the two first payments were made, and the third offered to be made; he gave sentence, that there was no need of an inventory at the instance of the plaintiff: which was confirmed by the delegates, first upon appeal, and afterwards upon a commission of review. *Raym.* 470. (8)

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(8) An inventory and account may be dispensed with where not applied for so long a period (*viz.* 45 years), that, *in conjunction with circumstances and affidavits*, it affords a reasonable presumption of the estates having been fully administered. *Ritchie* v. *Rees and Rees*, 1 *Add. Rep.* 144. But an inventory has been decreed after 13

How far the strict formalities before required, are necessary.

20. Although appraisements and inventories shall not be made according to the ecclesiastical law, nor to the statute aforesaid: yet, by the practice of the courts, if the goods of the deceased shall be appraised by any honest persons of the neighbourhood, and reduced into an inventory, and afterwards the said inventory shall be in due time exhibited before the judge who proveth the will or granteth the administration, upon the oath of the executor or administrator, such inventory shall receive credit in all causes and courts, and he that exhibiteth the same shall be freed from the burthen of proving the truth of the inventory, that is, that the deceased had no more goods; and he retorteth the proof of any goods having been omitted, upon the legatary or other person pretending interest in the goods of the deceased. 1 *Ought.* 344.

By which oath of the executor or administrator is to be understood, the oath which he took at the time of granting the probate or administration: unless the party be called afterwards to exhibit an inventory upon his corporal oath; for then he shall again take a special oath of the truth of the inventory, notwithstanding the former general oath that he took at the time of granting the probate or letters of administration. *Id.*

Strictness requisite in contestation of suit.

21. For sometimes it is demanded, and by the judge decreed, at the instance of the party having interest in the goods of the deceased, that an inventory be exhibited upon the oath of the executor or administrator, before the issuing of the probate or letters of administration under seal; and then, notwithstanding the former general oath had been taken for the faithful execution of the will or administering the goods of the deceased, and for exhibiting a true inventory, a special oath hath been used to be taken, at the time of exhibiting the inventory, of the truth thereof; and that, either personally, or by virtue of a commission. 1 *Ought.* 344.

And sometimes, before the granting, or at least before the [311]
issuing of the probate or letters of administration, (instead of an inventory of the goods of the deceased upon the oath of the party,) at the request of some person having interest, the judge issueth a commission for the appraisement and true valuation of the goods, rights, and credits, and inspection of the obligations, leases, and other writings and papers whatsoever, concerning the personal estate of the deceased, at the house of the deceased, or elsewhere, wheresoever his goods, rights, or credits remain or be, on such a day or days, with continuation and prorogation of the time and place, as shall be needful. *Id.*

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years: the court saying, that the executor must make it as well as he could; and if objected to, the length of time since he came into possession of the goods should be considered. *Strut* v. *Snow*, 9 Jan. 1793, *cor.* sir *W. Wynne, MSS. Cas.* 106.

Also in these cases, there usually issueth a monition against the other party in special, and all others in general, with whom any of the goods, rights, or credits of the deceased remain and be, that they exhibit or shew, or cause to be exhibited or shewed, really and with effect, to the appraisers by virtue of the commission aforesaid appointed, at the time and place of the execution thereof, the aforesaid goods, rights, and credits of the said deceased, and also the bonds, leases, and other writings and papers, concerning the personal estate of the deceased remaining or being with them or any of them, to the end they may be appraised and put in the inventory: on pain of law, and of contempt. 1 *Ought.* 344, 345.

And such commission being duly executed, the inventory is brought in and exhibited, signed by the hands of the commissioners or appraisers, or two of them at the least; without the oath of the party for the truth thereof. 1 *Ought.* 345.

And in such cases an inventory also is often required upon the oath of the executor or administrator, of such goods of the deceased as have been already disposed of. *Id.*

But after the inventory is exhibited, a creditor shall not be admitted to object thereto in the ecclesiastical court; for the statute of 21 *Hen.* 8., which requires the executor or administrator to make an inventory, only enjoins them to deliver it upon oath into the keeping of the ordinary, and the ordinary by the said statute is required to receive the same so presented or tendered to be delivered. As in the case of *Catchside* and *Ovington*, *T.* 6 *G.* 3. It was moved for a prohibition to the ecclesiastical court, on behalf of Mrs. Catchside, the administratrix. The case was, she had been cited into an inferior ecclesiastical court, at the promotion of Anne Ovington, a creditor, to exhibit
[312] an inventory. She brought one in; and the creditor objected to it. There was a decree for the creditor. The administratrix appealed to the superior ecclesiastical court which affirmed the decree. The suggestion for a prohibition was their want of jurisdiction. Unto which it was answered, on shewing cause, that it being after sentence, it was now too late for a prohibition, unless it shall appear that they have determined contrary to law. —— By lord *Mansfield* and the court: It appears upon the face of the proceedings, that the spiritual court hath no jurisdiction. — And the rule for a prohibition was made absolute. 4 *Burr.* 1922. (9)

(9) Again, in *Henderson* v. *French*, 5 *M.* & *S. Rep.* 407., the court held, that as the statute 21 *H.* 8. directed the executor, for the security of creditors and legatees, to make an inventory to be delivered to the bishop or ordinary; and that no bishop or ordinary should, under pain of 10*l.* refuse to take it, his office was merely ministerial to receive it when tendered. If the statute had intended more,

22. By the 13 *Ed.* 1. *st.* 1. *c.* 23. Executors shall have a writ of account, and the same action and process in the same writ, as the testator might have had if he had lived.

Action given to executors.

By the common law, executors should not have an action of account, for an account to be made to the testator, because the account rested in privity; for remedy whereof this action was made. But by the law of merchants, an action of account did lie for executors. 2 *Inst.* 404.

By the 4 *Ed.* 3. *c.* 7. Whereas in times past, executors have not had actions for a trespass done to their testators, as if the goods and chattels of the same testators carried away in their life, and so such trespasses have hitherto remained unpunished; it is enacted, that the executors in such cases shall have an action against the trespassers, and recover their damages, in like manner as they whose executors they be should have had if they were in life.

By the 25 *Ed.* 3. *st.* 5. *c.* 5. Executors of executors shall have actions of debt, accounts, and of goods carried away of the first testators, and executions of statute merchants, and recognizances made in court of record to the first testator, in the same manner as the first testator should have had if he were in life: and the same executors of executors shall answer to other of as much as they have recovered of the goods of the first testators, as the first executors should do if they were in full life.

23. By the statute of the 31 *Ed.* 3. *st.* 1. *c.* 11. In case where a man dieth intestate, the persons deputed by the ordinary to administer his goods, shall have an action to demand and recover as executors, the debts due to the person intestate in the king's court, for to administer and dispend for the soul of the dead; and shall answer also in the king's court, to other to whom the dead person was holden and bound, in the same manner as executors shall answer: and they shall be accountable to the ordinary, as executors be in the case of testament, as well of [313] the time past as of the time to come.

Action given to administrators.

Before this act, by the common law, administrators had no property in the goods and chattels as executors had: nor could they recover debts as executors could do; but by this statute they are enabled in both those respects: and further, whereas by the common law they were charged by the name of executors,

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it would have so said. A prohibition, therefore, lies to the consistory court, if it proceeds to hear exceptions to an inventory exhibited by an executor. *Hinton* v. *Parker*, 1 *Mod.* 168. S.P. But the practice of the ecclesiastical court is to admit objections of a creditor to an inventory, though not to an account. Per sir *W. Wynne* in *Barlow* v. *Birt*, *Prerog. M. Term*, *MSS. Cas.* 105., relying on *Griffiths* v. *Crayden*, 1771, *cor.* sir *G. Hay*. And see *Barclay* v. *Marshall*, 2 *Phill. Rep.* 188.

now they shall be charged by the name of administrators. *Gibs.* 478.

Action in case of rent in arrear.

24. By the 32 *H.* 8. *c.* 37. Forasmuch as by the order of the common law, the executors or administrators of tenants in fee simple, tenants in fee tail, and tenants for term of life, of rent services, rent charges, rent secks, and fee farms, have no remedy to recover such arrearages of the said rents or fee farms as were due unto the testators in their lives, nor yet the heirs of such testator, nor any person having the reversion of his estate after his decease, may distrain or have any lawful action to levy any such arrearages of rents or fee farms, due unto him in his lifetime as is aforesaid; by reason whereof the tenants of the demesne of such lands, tenements, or hereditaments, out of which such rents were due and payable, who of right ought to pay their rents and farms at such day and terms as they were due, do many times retain such arrearages in their own hands, so that the executors and administrators of the persons to whom such rents or fee farms were due, cannot have or come by the said arrearages of the same, towards the payment of the debts, and performance of the will of the said testators; it is enacted, that the executors and administrators of every such person to whom any such rent or fee farm shall be due, and not paid at the time of his death, shall have an action of debt for all such arrearages, against the tenant that ought to have paid the same, or against his executors or administrators; or may distrain for the same upon the lands and other hereditaments chargeable therewith, so long as they continue in the seisin or possession of the said tenant in demesne, who ought immediately to have paid the said rent or fee farm so being behind, to the said testator in his life; or in the seisin or possession of any other person claiming the same only from the same tenant by purchase, gift, or descent; in like manner and form as the testator might have done in his lifetime, and shall for the same distress lawfully make avowry upon their matter aforesaid. § 1.

Provided that this shall not extend to any such manor, lordship, or dominion in Wales, or in the marches of the same, whereof the inhabitants have used time out of mind to pay unto the lord or owner thereof at his first entry into the same, any sum for the redemption and discharge of all duties, forfeitures, [314] and penalties, whereof the said inhabitants were chargeable to any of their said lords, ancestors, or predecessors, before his said entry. § 2.

And if any man having in the right of his wife any estate in fee simple, fee tail, or for term of life, in any rents or fee farms, and the same shall be due and unpaid in the said wife's life; the husband after the death of his wife, his executors and administrators, may have an action of debt for the said arrearages,

against the tenant of the demesne that ought to have paid the same, his executors or administrators, or may distrain for the same, as he might have done if his wife had been living, and make avowry upon his matter as aforesaid. 32 *H.* 8. c. 37. § 3.

And if any person shall have any rents or fee farms for term of life of any other person, and the same shall be due and unpaid in the life of such other person, and he dieth; then he to whom the same was due, his executors or administrators, may have an action of debt against the tenant in demesne, that ought to have paid the same when it was first due, his executors and administrators; or may distrain for the same upon such lands and tenements out of which the said rents or fee farms were issuing and payable; in like manner and form as he might have done, if such person, by whose death the aforesaid estate in the said rents and fee farms was determined and expired, had been in full life; and the avowry for the taking of the same distress to be made as aforesaid. § 4.

And by the statute of the 11 *G.* 2. *c.* 19. Whereas where any lessor or landlord, having only an estate for life in the lands, tenements, or hereditaments demised, happens to die before or on the day on which any rent is reserved or made payable, such rent or any part thereof is not by law recoverable, by the executors or administrators of such lessor or landlord; nor is the person in reversion entitled thereunto, any other than for the use and occupation of such lands, tenements, or hereditaments, from the death of the tenant for life; of which advantage hath been often taken by the under-tenants, who thereby avoid paying any thing for the same: for remedy thereof it is enacted, that where any tenant for life shall happen to die before or on the day on which any rent was reserved or made payable upon any demise or lease of any lands, tenements, or hereditaments, which determined on the death of such tenant for life, that the executors or administrators of such tenant for life shall and may, in an action upon the case, recover of and from such under-tenant or under-tenants of such lands, tenements, or hereditaments, if such tenant for life die on the day on which the same was made payable, the whole, or if before such day, then a proportion of such rent, according to the time such tenant for life lived of the last year, or quarter of a year, or other time in which the said [315] rent was growing due, as aforesaid; making all just allowances, or a proportionable part thereof respectively. § 15.

In what courts to be brought.

25. An executor may sue another in the spiritual court touching the testator's goods, in this case, *viz.* if a man devise or bequeath corn growing, or goods, unto one; and a stranger will not suffer the executor to perform the testament: for this legacy, he shall sue the stranger in the spiritual court. *Swin.* 18.

But if a man take from the executor or administrator the

goods of the deceased, for this they must use their action of trespass, and not sue in the spiritual court: for they cannot sue for the goods of the deceased in a court ecclesiastical, but at the common law. *Swin.* 18. 10 *Mod.* 21.

Also tenants may be sued at the common law by executors or administrators for rent behind, and due to the testator or intestate in his lifetime, or at the time of his death; and they may for the same distrain the land charged with the rent. *Swin.* 18.

In what case co-executors must all join.

26. All the executors do represent the person of the testator, and therefore they must all join in suit against others; and in suit by others they must all be made defendants, or at least so many of them as do administer: for though executors themselves must take notice by the will how many executors there be, and must frame their suit accordingly, creditors and strangers need not take notice of any more than do administer, and execute the office of executor. *Went.* 95.

T. 6 *Ja. Smith* and *Smith.* The mother and her son, an infant, were made executors, and administration was granted to her during the minority of her son: she married again, and then her husband and she as executrix brought an action of debt against the defendant, who pleaded in abatement that the infant was not named; and upon a demurrer to that plea, it was held that the plea was good: but if it had been set forth specially in the declaration, that there was another executor under age, though not joined in the action, it might have been otherwise. *Yelv.* 130. 1 *Brownl.* 101.

Case where one co-executor refuseth.

27. If one executor refuse to undertake the executorship, then is the other executor to be admitted alone, and may execute the will, or commence any suit or be sued alone, as if no other had been named executor. But if he alter his mind, and afterwards become willing, then (his former refusal before the ordinary not-[316]withstanding) he may join with the other executor who proved the will; and if he release any debt due to the testator, the release is as sufficient, as if he had never refused. Which is to be understood, if he released before judgment; but after judgment, being no party to the suit, he cannot acknowledge satisfaction, because he was not privy to the judgment. *Swin.* 325.

And where there are several executors, and one of them refuseth before the ordinary, and the rest prove the will, he who refuseth may administer when he will, and therefore they who proved it ought to name him in every action; but if they all refuse, and the ordinary grants administration to another, then it is too late; for in such case they cannot afterwards prove the will. 9 *Co.* 38. *Henslow's* case. (z)

In what case one

28. Co-executors being in law but as one person, therefore

(z) Vide *supra*, *Probate*. 10

the act of one is the act of them all, and the possession of one is accounted the possession of all, and the payment of debts by or to one of them is the payment of or to all of them, and the sale or gift of the testator's goods by one is the sale or gift of all; and likewise a release before judgment of one of them, is a release of all. *Swin.* 328. [See 2 *Ves.* 268.] may do what all may do.

But it is not so with *administrators:* for they have but one authority given them by the bishop over the goods; which authority being given to many, is to be executed by all of them joined together. *Lord Bacon's Tracts*, 162. 1 *Atk.* 460.

Also one executor shall not be charged with the wrong or devastavit of his companion, and shall be no farther liable than for the assets which came to his hands. And therefore where an action was brought against two executors, and the jury found that the two and another were made executors, and that the third wasted the assets to the amount of 600*l.* and died, and that only 16*l.* came to the hands of the two others; the court held, that they should be chargeable for no more than the 16*l.*: for that it was the testator's folly to trust such a person, which must not turn to the prejudice of the other executors. 2 *Bac. Abr.* 395.

29. Regularly, one executor cannot sue another of his co-executors, touching any thing relating to his testator's will, or that is within the power, interest, duty, or office of an executor. 2 *Bac. Abr.* 396. (*a*) One executor cannot sue another. [317]

But if the residue of the personal estate, after debts and legacies be devised to both the executors, one of them may sue the other in the spiritual court for a moiety: for this is in the nature of a gift or legacy to him, and he may bring trespass against the other executor if he takes it out of his possession, or detinue if he detains it from him. 2 *Bac. Abr.* 396.

Or, in such case, he may have relief in equity.

30. It seemeth to be now settled, that where a man maketh two executors, and deviseth to them the residue of his goods after debts and legacies paid, and one of them dieth, that the survivor shall have the whole. 2 *Lev.* 209. 1 *Vern.* 482. Co-executor dying.

So where a man devised all the rest and residue of his goods, chattels, and personal estate, to two persons, their executors and administrators, and one of them died; on a bill brought by his executor against the surviving devisee, it was held, that the survivor should take the whole to his own use, and should not be a trustee as to the moiety for the representative of him who is dead; and that they were to be considered as joint-tenants, where sur-

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(*a*) But if a debtor make his creditor and another person executors, and the creditor abstain from proving the will, or acting as executor, he may maintain an action against the other for his debt due by the testator. *Rawlinson* v. *Shaw*, 3 *T. Rep.* 557.

vivorship takes place, as well in cases of chattels as in cases of inheritance. 1 *Abr. Ca. Eq.* 243. 12 *Ves.* 298.

Executor or administrator of an executor.

31. The executor of an executor (where there is no joint executor) is executor to the first testator, and hath right to all the profit, and is liable to all the charge that the first executor had, or was subject unto. But the one testator's goods shall not stand charged for the other testator's debts, but each for his own. *Swin.* 329.

If two be appointed executors, and the one maketh his testament, wherein he nameth his executor, and dieth, his co-executor surviving; in this case, the executor of the executor is not to be joined with the executor surviving, neither in the execution of the will, nor in suits or actions. And if the executor of the executor have any goods or chattels in his hand, which did belong
[318] to the first testator, the executor of the same testator surviving may have an action against the executor of the executor for the same: for the power of the executor who died first was determined by his death, the other then surviving. *Swin.* 324, 325.

Swinburne says, the executor of an executor cannot sell the land of the first testator. *Swin.* 329.

But in the case of *Rolls* and *Mason*, *T.* 10 *Ja.*, where the devise was, that the executor should sell, it was held, that the executor of the executor might sell, though not in being at the time of the devise. 2 *Brownl.* 194.

So in the case of *Garfoot* and *Garfoot*, *M.* 15 *C.* 2. Lands were devised to be sold by the executor. The executor died. The youngest children, for whose benefit the sale was ordered, preferred a bill against the heir. The heir demurs; because it was but an authority in the executor, which is dead with him. But the demurrer was overruled. 1 *Cha. Ca.* 35.

But the *administrator* of an executor is not liable: as in the case of *Tucker* and *Towel*, *M.* 9 *G.* 2. There was a libel in the spiritual court for a legacy. The defendant pleaded that it was a legacy given by the will of the testator, whose executor is dead, and he the defendant is administrator of the executor, and therefore is not liable for the legacies. Which plea the spiritual court refused, and therefore he applies for a prohibition.—By lord *Hardwicke* chief justice: No doubt but the spiritual court hath a general jurisdiction in suits for legacies; but the question is, whether they have in this suit as it is now brought. And I think they have not. For if an executor dies intestate, there is no privity between his administrator and the testator; and in order to continue the privity, there are administrations *de bonis non* granted, which is the constant course. Now here is a suit against the administrator of the executor, who is not administrator *de bonis non* of the first testator: so that there is no privity. But it is said, that here is what amounts to an allegation that this

administrator was possessed of the testator's goods, and so may be charged as executor of his own wrong. That doth not appear. But suppose it had been so, that would not be a ground to maintain this suit, but in that case there should be an administrator *de bonis non* set up, and he might then call him to an account in a court of equity: for the ecclesiastical court has only jurisdiction to compel the immediate representative of the testator or intestate to administer, and has power to grant probate, and to [319] commit administration. But when they have done that, they are *functi officio*, and have no further jurisdiction, but to call the executor or administrator to account. — And a prohibition was granted. *Cases in the time of Lord Hardwicke*, 185.

32. If administration is granted to two, and one dies, yet the administration doth not cease; for it is not like a letter of attorney to two, where by the death of one the authority ceaseth; but is rather an office; and administrators are enabled to bring actions in their own names; they come in the place of executors, and therefore the office survives. [*Adams* v. *Buckland*,] 2 *Vern.* 514. (1)

Administrator dying.

33. When an administrator hath judgment and dieth, his executors (as such) may not sue execution of the said judgment; for none shall have execution of this judgment, but he who shall be subject to the payment of the debts of the first intestate. *Brudenel*'s case, 5 *Co.* 9.

Executor of an administrator.

34. By the statute of the 17 *C.* 2. *c.* 8. Where any judgment after verdict shall be had, by or in the name of any executor or administrator; in such case an administrator of goods not administered may sue forth a *scire facias*, and take execution upon such judgment.

Administrator *de bonis non.*

35. By the statute of the 9 *Ed.* 3. *st.* 1. *c.* 3. In a writ of debt brought against divers executors, they nor any of them shall have but one essoin before appearance, that is to say, at the summons or attachment; nor after appearance, they shall have but one essoin, as the testator should have had: so that all the executors do represent the person of the testator as one person.

Actions brought against divers executors.

And though the sheriff do answer at the summons, that some of them have nothing whereby he may be summoned; yet there shall be an attachment awarded upon them. And if the sheriff answer, that he hath nothing whereby he may be attached; the great distress shall be awarded, so that at the great distress returned upon them, he or they that do first appear in the court shall answer to the plaintiff. And although some of them have appeared in the court, and make default at the day that great distress is returned upon the other; yet nevertheless he or they

(1) S. C. 1 *Atk.* 460. But see *Jacob* v. *Hartland*, p. 285. note.

shall be put to answer that first appeared at the great distress returned.

And in case the judgment pass for the plaintiff; he shall have his judgment and execution against them that have pleaded according to the law heretofore used, and against all other named in the writ, of the goods of the testator, as well as if they had
[320] all pleaded. And it is to be understood, that if any in such case will sue according to the law that hath been used heretofore, he
Costs. may freely do it notwithstanding this statute.

36. In all actions brought by executors or administrators, upon contracts, bonds, or other things made to the deceased, or for goods taken away in his life, they shall pay no costs by any statute. *Law of Ex.* 462. 2 *Bac. Abr.* 446.

That is to say; costs by the common law are not given in any case: and executors and administrators are not comprised within the several statutes which in order to prevent vexatious suits do require other persons to pay costs in like cases; for executors and administrators cannot so well be supposed to intend vexation, seeing that they sue only in the right of another; and have not perhaps so perfect a knowledge of the matter as their testator or intestate would have had if he had lived. But as they are not to pay costs, so on the contrary they are not to be allowed costs; because they are supposed to reimburse themselves any charges or expences they may have been at, in the account of the testator's or intestate's estate. 2 *Atk.* 108.

So also an executor defendant shall pay costs; and the judgment is, of the goods of the testator, if there are sufficient: if not, of the executor's own goods. Also when he is defendant, and there is judgment for him, he shall have his costs. 1 *Bac. Abr.* 517. 2 *Bac. Abr.* 446.

H. 12 *G.* 2. *Marsh* and *Yellowly.* When an executor must declare as executor, he shall pay no costs: but if the cause of action ariseth in the time of the executor, and is therefore a matter within his knowledge, and for which he may declare in his own right, and need not to declare as executor; he shall be liable to pay costs. *Str.* 682. 1106.

So where the thing in dispute is matter, not of fact, but of law, and consequently as much within the knowledge of the executor or administrator as of the testator or intestate; it hath been adjudged, that where judgment is given against the executor or administrator upon demurrer, they shall pay costs. As in the case of *Frazer* and *Moore, E.* 1720. Bill by an administrator: The defendant demurs: and the demurrer is allowed; and the bill is dismissed with costs; and so said to be the constant course in equity, by the whole court of exchequer. *Bunb.* 63.

M. 3 *G.* *Elwell* against *Quash and others.* There were three

executors, one of which gave a warrant of attorney to confess a judgment against himself and his co-executors; pursuant to which a judgment was entered against all the executors of the goods of the testator for the debt, and against the executor who gave the warrant of his own goods for the costs. Upon motion to set this aside, it was held to be ill; for executors may plead different pleas, and that which is most for the testator's advantage shall be received. And the judgment was set aside. *Str.* 20.

E. 1 *G.* 2. *Crutchfield* and *Scott.* The question was, whether, in an action by an executor, the defendant should be allowed to *bring money into court.* And on consideration, it was held he might; and that the effect of it would be, not to make the executor pay, but only lose his subsequent costs. And the same was allowed in the case of *Baker* and *Turberville, M.* 3 *G.*, *Str.* 796.

T. 7 *G.* 2. *Caswell* and *Norman.* An executor brought *error* of a judgment after a devastavit; and the court held, he ought to pay costs on affirmance. *Str.* 977.

H. 4 *G.* 3. *Harris* and *Jones.* On a question, whether an executor should be permitted to *discontinue,* without payment of costs. For the plaintiff executor, it was urged that an executor should not pay costs in any instance excepting one, namely, where he had brought an action as executor, which he might have brought in his own name. But by the court: The giving an executor leave to discontinue, is matter of discretion in the court: and they ought not to give him such leave, in any case where he hath knowingly brought his action wrong, unless he will consent to pay costs. *Bur. Mansf.* 1451.

Also on a judgment of *non prosequitur,* for the executor's wilful delay, he shall pay costs. *Bur. Mansf.* 1584.

[*Higgs* v. *Warry,* 6 *T. Rep.* 654.]

But he shall not pay costs on a nonsuit. *Ib.* (*b*)

(*b*) If an executor or administrator bring trover, stating the conversion after the testator's or intestate's death, and fail, he must pay costs. *Bollard* v. *Spencer,* 7 *T. Rep.* 358. But where the plaintiff sued as administratrix on a breach of covenant, *subsequent* to the death of her intestate, and judgment against her on demurrer, it was held that she was not liable to costs. *Tattersall* v. *Groote,* 2 *Bos. & Pul.* 253. And where the plaintiffs sued as executors in covenant against the lessor of their testator, for not providing timber for the repair of the demised premises, upon a demand made by the plaintiffs after the death of their testator; court of K. B. also held, that they were not liable to costs of a judgment as in case of a nonsuit, inasmuch as though the breach happened in their own time, they could only declare as executors upon the contract made with their testator. *Cooke* v. *Lucas,* 2 *East's Rep.* 395. No costs can be awarded on

Executors are sometimes decreed to pay costs in chancery where they have acted improperly, and have been decreed to pay interest for the money of the testator kept longer in their hands than was necessary. *Littlehailes* v. *Gascoigne*, 3 *Bro. C. C.* 73.

If the question be, in what right an executor ought to have sued, the rule seems to be that if the goods when recovered are assets in his hands, he ought to sue in his representative capacity. 3 *T. Rep.* 281.

Executor bankrupt.

Bankruptcy does not take away an executor's right to the executorship; but in order to secure the effects for the creditors
[322] and legatees, the court of chancery will appoint a receiver, to whom the assignees of the commission shall account for what they have received of the testator's goods. *Ex parte Ellis*, 1 *Atk.* 101. Or will admit the bankrupt a creditor against his own estate for what he claims as executor, and order the money to be paid into the bank. *Ex parte Leeke*, 2 *Bro. C. C.* 596. Excepting such beneficial interest as vests in the bankrupt himself. *Robinson* v. *Taylor*, *ib.* 589. Where the bankrupt and another were executors of a creditor of the bankrupt, the court permitted the co-executor to prove the debt under the commission, and ordered the money to be paid into the bank, although it appeared that the will was contested by the bankrupt in the ecclesiastical court, on the ground of a former will, by which he was sole executor and residuary legatee; and it was objected that administration might be had *pendente lite*. *Ex parte Shakeshaft*, 3 *Bro. C. C.* 198.

VI. *Of the payment of debts by executors or administrators.*

Ordinary liable.

1. By the statute of *Magna Charta*, *ch.* 18. (which lord *Coke* says is in affirmance of the common law), Where one indebted to the king shall die, the king shall be first satisfied for his debt, and the residue shall remain to the executors to perform the testament of the dead: And if nothing be owing unto the king,

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prohibition against executors, against whom judgment was obtained on demurrer upon a question, whether they were entitled to a *general* or *limited* probate. *Scammell* v. *Wilkinson*, 3 *East's Rep.* 202. The court of C. B. set aside a judgment and warrant of attorney given to secure an annuity for a defect in the memorial, without costs, because it was the case of an executor. 1 *Bos. & Pul.* 335. But where the plaintiff sued as administrator upon a contract made with his intestate, and assigned by him to J. S., for whose benefit the action was brought, a verdict being found for the defendant, the court made an order for the plaintiff to pay costs. *Comber* v. *Hardcastle*, 3 *Bos. & Pul.* 115.

all the chattels shall go to the use of the dead (saving to his wife and children their reasonable part).

Upon which, lord *Coke* says, three things are to be observed: 1. That the king by his prerogative shall be preferred in satisfaction of his debt by the executors, before any other. 2. That if the executors have sufficient to pay the king's debt, the heir that is to bear the countenance, and sit in the seat of his ancestor, or any purchaser of his lands, shall not be charged. 3. If nothing be owing to the king, or any other, all the chattels shall go to the use of the dead, that is, to his executors or administrators, saving their reasonable parts to the wife and children as aforesaid.

And by a constitution of *Othobon:* Since the uncertainty of death often deprives men of the opportunity of making their last wills, human piety acteth mercifully towards the deceased, by distributing their goods to pious uses; so that they follow and help them, and propitiously intercede for them with the heavenly Judge; therefore we, by our approbation confirming the provision heretofore made (as it is said) by the prelates of the king- [323]
dom of England, with the approbation of the king and barons, concerning the goods of such as die intestate, do strictly forbid prelates and all other whatsoever, to take or seize the goods of intestates, contrary to the provision aforesaid. *Athon.* 121.

Which provision *John of Athon* understandeth to be that which is made by the statute of the 13 *Ed.* 1. *c.* 19., but this cannot be right; for this constitution was made seventeen years before that statute. *Gibs.* 478. But the provision meant seemeth plainly to be the aforesaid statute in the *Magna Charta.*

And by a constitution of archbishop *Stratford* it is ordered thus: Forasmuch as it happeneth sometimes, that persons dying intestate, the lords of the fees do not permit the debts of the deceased to be paid out of their moveable goods; we do decree, that none shall henceforth do the same, on pain of the greater excommunication. *Lind.* 171.

Executors and administrators liable.

2. By the statute of the 31 *Ed.* 3. *st.* 1. *c.* 11. The persons deputed by the ordinary to administer the goods of intestates, shall have an action to demand and recover, as executors, the debts due to the person intestate, in the king's court, for to administer and dispend for the soul of the dead; and shall answer also in the king's court, to other to whom the said dead person was holden and bound, in the same manner as executors shall answer. And they shall be accountable to the ordinaries, as executors be in the case of testament, as well of the time past as the time to come.

But before this act, action laid by the common law, against the deputies or committees of the ordinary, by the name of ex-

ecutors, but not by the name of administrators until this act. 9 *Co.* 39.

By the statute of the 30 *C.* 2. *c.* 7. The executors and administrators of any person, who, as executor in his own wrong, or administrator, shall waste or convert any goods, chattels, estate, or assets, of any person deceased, to his own use, shall be liable and chargeable in the same manner as their testator or intestate would have been if he had been living.

And by the statute of the 4 & 5 *W. c.* 24. Forasmuch as it hath been a doubt whether the said statute of the 30 *C.* 2. did extend to the executors and administrators of any executor or administrator of right, who for want of privity in law were not before answerable, nor could be sued for the debts due from the first testator or intestate, notwithstanding that such executors or administrators had wasted the goods and estate of the first testator or intestate, or converted the same to their own use; it is
[324] hereby declared, that all and every the executors or administrators of such executor or administrator of right, who shall waste or convert to their own use, goods, chattels, or estate of their testator or intestate, shall be liable and chargeable in the same manner as their testator or intestate should or might have been. § 12.

Dr. *Swinburne* says, If a testator by his testament doth charge his executor to pay his debts, the creditors in respect of such charge may sue for them in the ecclesiastical court. *Swin.* 19.

But this (as it seemeth) must be understood, where there are special words in the will so directing it: as if the testator leave to his creditor such a sum in lieu and satisfaction of his debt, or the like: otherwise, the suit must be (as for other debts) in the temporal courts.

Devisee or heir at law of lands liable.

3. By the statute of the 3 *W. c.* 14. *Whereas it is not reasonable or just, that by the practice or contrivance of any debtors, their creditors should be defrauded of their just debts: and nevertheless it hath often so happened, that where several persons having by bonds or other specialties bound themselves and their heirs, and have afterwards died seised in fee simple of and in manors, messuages, lands, tenements, and hereditaments, or had power to dispose of or charge the same by their wills or testaments, have (to the defrauding of such their creditors) by their last wills or testaments devised the same, or disposed thereof in such manner, as such creditors have lost their said debts* (2): for remedy of which, and for the maintenance of just

(2) At common law the devisee was not liable to debts, the descent being broken; and the rule of equity before that statute did not differ from the rule of law, unless under particular circumstances. The court of chancery had often attempted to make a devised estate liable to specialty debts, but was not able to come at it, which occa-

and upright dealing, it is enacted, that all wills and testaments, limitations, dispositions, or appointments, of or concerning any manors, messuages, lands, tenements, or hereditaments, or of any rent, profit, term, or charge, out of the same, whereof any person at the time of his decease shall be seised in fee simple in possession, reversion, or remainder, or hath power to dispose of the same by his last will and testament, shall be deemed and taken (only as against such creditors as aforesaid, their heirs, successors, executors, administrators, and assigns) to be fraudulent, and clearly, absolutely, and utterly void, frustrate, and of none effect; any pretence, colour, feigned or presumed consideration, or any other matter or thing to the contrary notwithstanding. 3 *W. c.* 14. § 2.

And in the cases before mentioned, all such creditors may have and maintain actions of debt upon their bonds and specialties against the heir at law of the obligor and such devisee jointly; and such devisee shall be liable and chargeable for a false plea by him pleaded, in the same manner as any heir should have been for any false plea by him pleaded, or for not confessing the lands or tenements to him descended. § 3.

Provided, that where there shall be any limitation or ap- [325] pointment, devise, or disposition, of or concerning any manors, messuages, lands, tenements, or hereditaments, for the raising or payment of any real and just debts, or any portions or sums of money for any child or children of any person other than the heir at law, according to any marriage contract, or agreement in writing, *bona fide* made before such marriage, the same shall be in full force: and the same manors, messuages, lands, tenements, and hereditaments, shall be holden and enjoyed by every such person, his heirs, executors, administrators, and assigns, for whom the said limitation, appointment, devise, or disposition was made, and by his trustee or trustees, their heirs, executors, administrators, and assigns, for such estate or interest as shall be so limited or appointed, devised, or disposed; until such debt or portion shall be raised and paid. § 4.

And whereas several persons being heirs at law, to avoid the payment of such just debts, as in regard of the lands descending to them they have by law been liable to pay, have sold, aliened, or made over the same before any process was or could be issued

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sioned the statute. *Gorton* v. *Hancock, Ridgw. Ca.* t. *Hardw.* 312. Specialty creditors on a devise for payment of debts must come in under the will. *Dict. per* L. Ch. in *Howse* v. *Chapman*, 4 *Ves.* 544. A direction in a will to pay simple contract before specialty creditors is not void, being within the exception in the statute. *Millar* v. *Horton, Coop. Ch. C.* 45. When there is a devise to trustees, and the first trust is for payment of debts, it takes it out of the statute. *Earl of Bath* v. *Earl of Bradford*, 2 *Ves.* 586.

out against them; it is enacted, that in all cases where any heir at law shall be liable to pay the debt of his ancestor, in regard of any lands, tenements, or hereditaments, descending to him, and shall sell, aliene, or make over the same before any action brought or process sued out against him; such heir at law shall be answerable for such debt, in an action of debt, to the value of the said land so by him sold, aliened, or made over; in which case all creditors shall be preferred as in actions against executors and administrators, and such execution shall be taken out upon any judgment so obtained against such heir, to the value of the said land, as if the same were his own proper debt; saving that the lands, tenements, and hereditaments *bona fide* aliened before the action brought, shall not be liable to such execution. 3 *W. c.* 14. § 5.

Provided, that where an action of debt upon any specialty is brought against any heir, he may plead *riens per descent* at the time of the original writ brought, or the bill filed against him; and the plaintiff in such action may reply that he had lands, tenements, or hereditaments, from his ancestor before the original writ brought, or bill filed; and if upon issue joined thereupon it be found for the plaintiff, the jury shall inquire of the value of the lands, tenements, or hereditaments so descended, and thereupon judgment shall be given, and execution shall be awarded as aforesaid; but if judgment be given against such heir by confession of the action, without confessing the assets descended or upon demurrer, or *nihil dicit*, it
[326] shall be for the debt and damages, without any writ to inquire of the lands, tenements, or hereditaments so descended. § 6.

Provided, that every devisee made liable by this act, shall be liable and chargeable in the same manner as the heir at law by force of this act, notwithstanding the lands, tenements, and hereditaments to him devised shall be aliened before the action brought. § 7.

M. 12 *G. Buckley* and *Nightingale*. An heir that hath lands by hereditary descent, shall not be liable for the debt of his ancestor further than to the value of the lands descended: and as soon as he hath paid his ancestor's debts to the value of the land, he shall hold the land discharged; otherwise he might be chargeable *ad infinitum*. *Str.* 665.

And if an heir is sued upon a bond debt of his ancestor, in which he is bound, and he pays the money; the executor shall reimburse him as far as there are personal assets of the testator's come to his hands, if it is not otherwise ordered by the will. 1 *Cha. Ca.* 74. 2 *P. Will.* 175.

So if a man mortgages land, and covenants to pay the money, and dies; the personal estate of the mortgager shall, in favour of the heir, be applied to exonerate the mortgage. 2 *Salk.* 449.

Yea, though there be no covenant in the deed for the payment of the mortgage money, yet the personal estate shall be liable in the hands of the executor. 2 *Salk.* 449. 1 *Vern.* 436.

If a man dies indebted by bond, and seised in fee of divers lands, part of which he devises to one, and other part he permits to descend to his heir (not mentioning them in his will); the lands permitted to descend shall be first applied to pay the bond debt. And the reason is, because the applying the devised lands to pay the bond debts, would disappoint the will; which equity will not permit, if it can be avoided: Whereas it no way disappoints the will to say, that the lands not mentioned should be in the first place liable to pay the debts. But it seems it would be otherwise, if the testator had devised the lands to his heir at law; for though such devised were void (as to the purpose of making the heir take otherwise than by descent), yet it shews the testator's intent, that the heir should have the land; and therefore it seemeth that the lands devised to one, and the other lands devised to the heir at law, should in such case contribute in proportion to pay the bond debts. Also, for the above- [327]
mentioned reason, it seemeth that the lands permitted to descend to the heir at law, and not mentioned in the will, shall be applied to pay the bond debts, before a *specific legacy*; lest otherwise the testator's intention should be disappointed. 3 *P. Will.* 367.

So where lands, upon which there was a mortgage, were devised to one, and other lands descended to the heir at law; it was decreed by the lord chancellor *Hardwicke* upon great deliberation, that where the personal estate is sufficient to discharge the incumbrance, the ultimate fund is the land descended to the heir at law: and although the creditor may come upon which fund he pleases, yet if he proceeds against the lands mortgaged, the devisee may have his remedy over against the heir at law; otherwise the mortgage might exhaust the whole lands devised, and there would be no benefit in the will to the devisee. 2 *Atk.* 424—439.

How far a charge upon lands for payment of debts, shall enure and be in force against purchasers of those lands from the devisee for a valuable consideration, hath been made a question. As in the case of *Elliot* and *Merriman*, *E.* 1740. Thomas Smith became indebted to several persons by bond, and likewise by simple contract. In three of these bonds, Goodwin was bound with him as surety; and afterwards Goodwin gave his own bond alone to one of the creditors, to whom Smith was bound in a single bond. Smith being thus indebted made his will, and in the beginning of it says, "My will is, that all my debts be paid: "and I do *charge all my lands* with the payment thereof." After which, by another clause in the said will, he gave "all his real

"and personal estate to Goodwin, to hold to him, his heirs, "executors, administrators, and assigns, *chargeable nevertheless "with the payment of all his debts and legacies."* Of this will he made Goodwin executor. The testator died in 1724. Goodwin proved the will; and in that same year sold a freehold estate of the testator's to Hunt; in the year following sold a leasehold of the testator's to White; and in 1727 sold another estate of the testator's, consisting of both freehold and leasehold, to Merriman. In the several deeds, by which these estates were conveyed from Goodwin to the purchasers, the will of Smith was recited; and to one of those deeds Elliot, a creditor of Smith, was a subscribing witness. These lands were sold in the neigh-
[328] bourhood by public auction. At the time of these sales, the creditors all of them either lived in the town where Goodwin lived, or within three or four miles of it. During all this time, and till the year 1730, the creditors went on regularly, receiving their interest, which was at 5*l. per cent.*, of Goodwin. Goodwin was a solvent man till 1732, and then he became a bankrupt. In 1734, the creditors of Smith brought their bill, against the purchasers of these lands, against Goodwin, and against the assignees under his commission of bankruptcy, in order to have a satisfaction of their debts out of those lands which were sold by Goodwin.—By the master of the rolls: It is almost impossible to make a determination in the present case, but that it must fall out unfortunately on the one party or the other. The dispute arising between creditors on the one side, and purchasers on the other, both these sorts of persons are entitled to the favour of this court; and in the present case, a misfortune must fall upon one of them. On whom it is to fall, is the question. And this is a question that must so frequently have happened, that it is extraordinary to find no determination directly in point. The case is this: Smith being possessed of a real and personal estate, was indebted to several persons by bond; in three of which bonds, Goodwin was bound with him as surety; and he had contracted likewise some other debts; and being thus indebted he makes his will, and charges his real and personal estate with the payment of his debts and legacies, and makes his devisee executor. It is true indeed, the words in the will do not amount to a devise of the lands to be sold for payment of the debts; and they only import a charge upon them for that purpose. However, this is such a devise, as is within the meaning of the proviso of the statute of fraudulent devises, and does interrupt the descent to the heir at law.——The testator died in 1724. Goodwin paid interest for the debts regularly till 1730. After the testator's death, three sales of this estate were made by Goodwin; one, of an estate which was intirely freehold; another, of an estate intirely leasehold; and a third, consisting of freehold and

leasehold both. The bill in general is brought by the creditors of Smith against the purchasers, in order to have a payment of their debts out of the lands of Smith, which were sold to them by Goodwin.—With regard to the *leasehold* estate, the case is so extremely plain that the sale of that must stand, and that the creditors cannot have satisfaction out of it, that it can admit of no manner of doubt. The executors are the proper persons, [329] that by law have a power to dispose of a testator's personal estate. It is indeed true, that personal estate may be clothed with such a particular trust, that it is possible the court in some cases may require a purchaser of it to see the money rightly applied. But unless there is some such particular trust, or a fraud in the case, it is impossible to say but the sale of the personal estate, when made by an executor, must stand; and that after the sale is made, the creditors cannot break in upon it.——I will now consider the other sales that have been made, and will examine them, first, upon the general rules of the court; and in the next place, upon the particular circumstances which this case is attended with. With regard to the first of these matters, the general rule is, that if a trust directs that land should be sold for the payment of debts generally, the purchaser is not bound to see that the money be rightly applied. On the other hand, if the trust directs, that lands should be sold for the payment of certain debts, mentioning in particular to whom those debts were owing; the purchaser is bound to see that the money be applied for the payment of those debts. The present case indeed does not fall within either of these rules; because here lands are not given to be sold for payment of debts, but are only charged with such payment. However, the question is, whether that circumstance makes any difference: and I think it doth not. And if such a distinction were to be made, the consequence would be, that whenever lands are charged with the payment of debts generally, they could never be discharged of that trust without a suit in this court; which would be extremely inconvenient. No instances have been produced to shew, that in any other respect the charging lands with payment of debts differs from the directing them to be sold for such a purpose; and therefore there is no reason that there should be a difference established in this respect. The only objection that seemed to be of weight with regard to this matter is, that where lands are appointed to be sold for the payment of debts generally, the trust may be said to be performed as soon as those lands are sold; but where they are only charged with the payment of debts, it may be said, that the trust is not performed till those debts are discharged. And so far indeed is true, that where lands will be charged in the hands of the purchaser; because it was to the very purpose of making the lands a fund for that

payment, that it should be a constant and subsisting fund: But where lands are not burthened with such a subsisting charge, the purchaser ought not to be bound to look to the application of the money. And that seems to be the true distinction.— Having thus considered the case under the general rule, I will now consider it under the particular circumstances that attend it. And the particular circumstances are such, as are far from strengthening the plaintiff's case, but rather the contrary. One of those circumstances is, the length of time the plaintiffs have lain by, without at all insisting on any charge upon these estates. Goodwin was a solvent man till his bankruptcy in 1732. Here have been three purchases of those estates, made at different times: one, in 1724; another, in 1725; and the third, in 1727. The first of them was made by Hunt, the second by White, and the third by Merriman. During all these transactions, the plaintiffs do not mention one word of their charge upon this estate; but, on the contrary, regularly received their interest of Goodwin, till the year 1730. 'Tis true, indeed, that there is no express proof, that the plaintiffs knew of these purchases, but there is reason to imagine that they did. The purchases were made in the neighbourhood by public auction. Some of the creditors lived in the same town that Goodwin did; and all of them lived within three or four miles of him. And Elliot, one of the creditors, was a subscribing witness to one of the purchase deeds. The want of notice, too, on the part of the purchasers, is a considerable circumstance in their favour. It is indeed true, that they had notice that there were debts chargeable upon this estate; but it does not appear they knew to whom those debts were owing. Another circumstance is, that Goodwin was a co-obliger in three of these bonds, and to another of the obligees he afterwards gave his bond alone, which may well be considered as a satisfaction for that bond. By this it appears, that the creditors greatly relied upon Goodwin for their paymaster; and there is not much reason therefore, that they should now be allowed to resort to the testator's estate. Upon the whole, I am of opinion, that the plaintiff's bill must be dismissed, and even with costs, as against White; there being no manner of pretence for the plaintiffs to come upon that estate, it being all leasehold, and sold to White by the executor, who by law is the proper person intrusted to
[331] dispose of the testator's personal estate. However, with regard to the rest of the defendants, I will only dismiss the bill generally, without costs.—And so it was decreed. *Barnard. Cha. Ca.* 78.

Lands devised to divers to be sold for payment of

4. By the statute of the 21 *H.* 8. *c.* 4. Whereas divers persons, having other persons seised to their uses of and in lands and other hereditaments to and for the declaration of their wills, have, by their last wills and testaments, willed and declared such their

lands, tenements, or other hereditaments to be sold by their executors, as well for the payment of their debts, performance of their legacies, necessary and convenient finding of their wives, virtuous bringing up, and advancement of their children to marriage, and also for other charitable deeds to be done by their executors for the health of their souls; and notwithstanding such trust and confidence so by them put in their said executors, it hath oftentimes been seen, where such last wills and testaments of such lands and other hereditaments have been declared, and in the same divers executors named and made, that after the decease of such testators, some of the said executors, willing to accomplish the trust and confidence that they were put in by the said testator, have accepted and taken upon them the charge of the said testament, and have been ready to fulfil and perform all things contained in the same; and the residue of the same executors, uncharitably, contrary to the trust that they were put in, have refused to intermeddle in any wise with the execution of the said will and testament, or with the sale of such lands so willed to be sold by the testator: and forasmuch as a bargain and sale of such lands, tenements, or other hereditaments, so willed by any person to be sold by his executor after his decease, according to the opinion of divers persons, can in no wise be good or effectual in the law, unless the same bargain and sale be made by the whole number of the executors named for the same; by reason whereof, as well the debts of such testator have rested unpaid, to the great danger and peril of the souls of such testators, and to the great hinderance, and many times to the utter undoing of their creditors; as also the legacies and bequests made by the testator to his wife and children, and for other charitable deeds to be done for the wealth of the soul of the same testator that made the same testament, have been also unperformed, as well to the extreme misery of the wife and children of the said testator, as also to the let of performance of other charitable deeds for the wealth of the soul of the said testator, to the displeasure of Almighty God: for remedy whereof, it is enacted, that where part of the executors named in any such testament of any such person so making or declaring any such will of any lands, tenements, or other hereditaments, to be sold by his executors, after the death of any such testator, do refuse to take upon him or them the administration and charge of the same testament and last will, wherein they be so named to be executors, and the residue of the same executors do accept and take upon them the care and charge of the same testament and last will; that then all bargains and sales of such lands, tenements, or other hereditaments, so willed to be sold by the executors of any such testator,

debts, one of them may sell. (c)

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(c) *Vide supra, Form and Manner*, 21.; *et infra*, 8.

by such of the executors as shall accept and take upon him or them such care or charge of administration of the same testament, shall be as good and effectual in the law, as if all the residue of the same executors named in the said testament, so refusing the administration of the same testament, had joined with him or them in the making of such bargain or sale.

In what case the heir may enter for the condition broken.

5. A man deviseth *his lands to be sold* after his death, by his executor. One tenders to him a certain sum of money for the lands, but not to the value; and the executor afterwards held the land in his own hand two years, to the intent to sell the same dearer to some other, and took the profits all this while to his own use. Here the executor is to make the sale as soon as he can; and if he do not, the heir of the devisor may enter: for he took the profits here to his own use, and as assets. But if a man devise, that his *executor shall sell* his land, there he may sell at any time, for that he hath but a bare power, and no profit. *Litt.* § 383.

A person seised in fee, deviseth the land to his executors to pay his debts, and dies; if his executors pay not every debt which the testator owed upon demand, the heir of the testator may enter for the condition broken: because in law it is a devise upon condition. 1 *Roll's Abr.* 439.

But the chancery may relieve, upon the payment of such debt afterwards.

Fraudulent alienations to defeat creditors.

6. By a constitution of archbishop *Stratford*, all who shall give away or alienate their goods upon their death beds, to defeat their creditors, to their wives and children; and all who shall counsel the same, or assist therein, or receive the said goods; shall incur the penalty of the greater excommunication: and the giver shall not have christian burial. And no other proof shall be required, that the gift or alienation was malicious or fraudulent, but that enough doth not remain for the purposes abovesaid. *Lind.* 161.

And by the statute of 13 *El.* c. 5. For the avoiding of fraudulent deeds, or other conveyances of lands or goods to defraud creditors and others, it is enacted, that every such deed [333] or conveyance shall (as against such creditors) be void and of none effect.

In the case of *Taylor* and *Jones*, June 13, 1743: a husband who had 1733*l.* stock devised to him after marriage, vests it in trustees, for the benefit of himself for life, of his wife for life, and afterwards for the benefit of his children. By *Fortescue*, master of the rolls. It is a fraudulent settlement as to creditors; but with respect to the wife and children, it is good as against the father, and even against a voluntary conveyance; but is void as to creditors. 2 *Atk.* 600.

Fraudulent administra-

7. By the statute of the 13 *El.* c. 8. Forasmuch as it is often

put in ure to the defrauding of creditors, that such persons as are to have the administration of the goods of others dying intestate committed unto them, if they require it, will not accept the same, but suffer or procure the administration to be granted to some stranger of mean estate, and not of kin to the intestate; from whom themselves, or others by their means, do take deeds of gift, and authorities by letters of attorney, whereby they obtain the estate of the intestate into their hands, and yet stand not subject to any debts owing by the intestate; it is enacted, that every person who shall obtain any goods or debts of any person dying intestate, upon any fraud as is aforesaid, or without such consideration as shall amount to the value of the same goods or debts, or near thereabouts, (except it be in satisfaction of some just and principal debt of the value of the same goods or debts to him owing by the intestate at the time of his decease,) shall be charged so far as those goods and debts will satisfy as executor of his own wrong. (*d*) tions to defeat creditors.

8. Assets are of two sorts; the one assets *by descent*, the other assets in *hand*. Assets *by descent* is, where a man is bound in an obligation, and dies seised of lands in fee simple, which descend to his heir, then his land shall be called assets, (*assez, satis*,) that is, enough or sufficient to pay the same debt; and by that means the heir shall be charged, as far as the land so to him descended will stretch. Assets *in hand* is, when a man in like manner indebted makes executors, and leaves them sufficient to pay, or some commodity or profit is come unto them in right of their testator; this is called assets in their hands. *Terms of the Law*. Assets.

There is also another division of assets, into *legal* and *equitable* assets: *legal* assets are such as are liable to debts and legacies by the course of law; *equitable* assets are such as are only liable by the help of a court of equity.

So also there are *real* and *personal* assets: *real* assets are such as concern the land; *personal* are such as concern the personal estate only. [334]

If a man deviseth *land to be sold*; neither the money thereof coming, nor the profits of the land for any time to be taken, shall be accounted as any of the goods and chattels of such person deceased. 21 *H*. 8. *c*. 5. § 5.

But if a man deviseth land to be sold by one for payment of his debts and legacies, and maketh the same person his *executor*, and dies; the money made by such person upon the sale of the land, shall be assets in his hands. 1 *Roll's Abr*. 920.

But otherwise it is, where the land is devised to be sold *by the executor and others*; for there the money shall not be assets; for

(*d*) See a full exposition of this statute in *Wentworth's Off. Ex*. p. 181. edit. 1728.

they are not trusted with it as executors. 1 *Roll's Abr.* 920. That is, it shall not be assets at law, but it shall be assets in equity. 1 *Abr. Cas. Eq.* 141. (*e*)

So land *articled* by the testator in his lifetime to be sold, is as money. 1 *Salk.* 154.

If there is a *mortgage for years* (though never so many), this is assets at law: because the whole interest is not gone from the mortgagor, the reversion is fee being left in him; but if it is a *mortgage in fee*, it is only assets in equity, because the legal estate is gone out of the obligor. *Plunkett* and *Penson*, Apr. 3. 1742.

If there is a mortgage in fee, and two descents cast, and there is more due on it than the value of the land, and though the mortgagor says he will not redeem; yet it shall go to the executor, and not to the heir, the equity of redemption not being foreclosed or released. *Taber* and *Grover*, *M.* 1699. 2 *Vern.* 367.

[335] But if a mortgagee in fee enters for a forfeiture, and after some years' enjoyment absolutely sells the land to *J. S.* and his heirs; this estate shall not be looked upon as a mortgage in the hands of *J. S.* but shall go to his heir, and not to his executor. *Cotton* and *Isles*, *M.* 1684. 1 *Vern.* 271.

A man having several mortgages, one in fee, on which he entered for a forfeiture, devised those lands which were mortgaged in fee to his two daughters and their heirs, and the mortgages to them, their executors, and administrators. One of the daughters died: her share of the lands which were mortgaged in fee, shall go to her heir, and not to her executors; for it was the testator's intent that those lands should pass as a real estate, though between him and a mortgagor, they were but a mortgage. *Noys* and *Mordaunt*, *H.* 1706, 2 *Vern.* 581.

If the heir of the mortgagee forecloses the mortgagor, yet the land shall go to the executor, unless the heir thinks fit to pay him the mortgage money; and then he may have the benefit of the mortgage. 2 *Vern.* 67.

If the lands are devised to one for life, remainder to another in fee, and the lands are charged with the payment of a sum of money, either by a former devise, rent-charge, or mortgage; the

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(*e*) The court of chancery leans to construe assets *equitable* rather than *legal*; because in the former case the debts are paid *pari passu*, being equal in conscience, whereas in the latter, they are paid in a course of administration. Therefore, where an executor is also trustee for the payment of debts, the assets are *equitable*, whether lands are devised to him to sell or he have only a power to sell. *Lewin* v. *Okely*, 2 *Atk.* 50. *Hargrave* v. *Tindal*, 1 *Bro. C. C.* 136. *n.* *Silk* v. *Prime*, 1 *Bro. C. C.* 138. *n.* *Newton* v. *Bennet*, *Ib.* 135. *Batson* v. *Lindegreen*, 2 *Bro. C. C.* 94. [A charge for payment of debts makes equitable assets. *Bailey* v. *Ekins*, 7 *Ves.* 319. See *infra*, 25. p. 357.]

tenant for life shall contribute and pay a proportionable part of such sum. *Hayes* and *Hayes*, *H.* 25. *C.* 2. 1 *Ch. Ca.* 223.

And in the case of *Cornish* and *Mew*, *H.* 27 & 28 *C.* 2. it was decreed, that the tenant for life should contribute one third, and he in remainder two-thirds to redeem. 1 *Ch. Ca.* 271.

The same day in another cause, where a jointress was of lands mortgaged, it was decreed, that the jointress paying the mortgage, should hold over till she and her executors were repaid with interest. *Bertue* and *Style*, 1 *Cha. Ca.* 271.

Also where the mortgagee devised the mortgaged lands to *A.* for life, remainder to *B.* in fee, and the mortgagor redeemed the land: it was decreed that *A.* should have one-third, and *B.* two-thirds of the mortgage money. *Brent* and *Best*, *M.* 1682. 1 *Vern.* 70.

Lands in mortgage are devised to *A.* for life, remainder to *B.* in fee. *A.* dies; and a bill being brought against his executors, it was held, that though *A.* in his lifetime might have been compelled to contribute one-third towards payment of the mortgage, in respect of his estate for life; yet his executor shall be obliged to contribute only in proportion to the time that *A.* his testator [336] enjoyed it. *Clyat* and *Batteson*, *T.* 1686. 1 *Vern.* 404.

When upon a mortgage money is made payable to the heir or executor; there, before the day, or at the day of payment, the mortgagor hath election to pay it to which he pleases; but after the day of payment is over, and the mortgage forfeited by law; though equity doth give the mortgage relief, so as upon the payment of the money, he shall have his land, yet equity will not revive the election of the mortgagor to pay it to the heir or executor, but then he shall be forced to pay it to the executor, because it came out of the personal estate of the testator, and thither it shall return. But if in the mortgage, neither heir nor executor is mentioned; then after the death of the mortgagee, the law determines it to be paid to the executor. 2 *Freem.* 20.

If a man is seised of an *advowson* in fee, and the church doth become void; the void turn is a chattel: and if the patron dieth before he doth present, the advowson doth not go to his heir, but to his executor. *Wats. c.* 9.

If the grant of the next avoidance be to one, his heirs and assigns; yet it is but a chattel, and shall go to the executors: for where the thing itself is a chattel, the word *heirs* shall not make it an inheritance. *Wats. c.* 10.

M. 4. *G.* 2. *Robinson* and *Tonge*. Decreed, that an advowson in fee, is assets in the hands of the heir, for payment of debts. And the decree was affirmed in the house of lords. *Stra.* 879. 3 *P. Will.* 399.

And in the case of *Westfaling* and *Westfaling*, Mar. 5, 1746; lord *Hardwicke* decreed, that an advowson in fee in gross, is as-

sets by descent, to satisfy specialty debts; and as to an advowson appendant to a manor, he said there could be no doubt, because the manor itself being assets, what is appendant must be assets likewise. 3 *Atk.* 465.

In the case of *Oldham* and *Pickering*, *M.* 8 *W.* it was adjudged that an estate *pur autre vie*, although it be assets (by the statute of frauds and perjuries) for the payment of *debts;* yet it is not distributable, nor subject to the payment of *legacies.* 2 *Salk.* 464. *L. Raym.* 96.

But by the statute of the 14 *G.* 2. *c.* 20. Whereas doubts have arisen on the said statute of frauds and perjuries, where no devise of estates *pur autre vie* hath been made, to whom the surplus of such estates, after the death of such deceased owners thereof are paid shall belong, it is enacted, that such estates *pur autre vie*,
[337] *in case there be no special occupant thereof*, of which no devise shall have been made according to the said act, or so much thereof as shall not have been so devised, shall go and be applied and distributed in the same manner as the personal estate of the testator or intestate.

If an executor has a *lease* for years of land, of the value of 20*l.* a year, rendering rent of 10*l.* a year; it is assets in his hands only for 10*l.* over and above the rent. *Cro. El.* 712.

If an executor renew, he shall account for the new lease as well as the old, for the benefit of the creditors. 2 *Cha. Ca.* 208.

Assets in *Ireland* are assets in *England:* and so it hath been resolved, that if the executor hath goods of the testator in any part of the world, he shall be charged in respect of them. *Cro. Jac.* 55. 6 *Co.* 46.

So an estate in the *plantations* is testamentary, and assets to pay debts. 2 *Ventr.* 358.

Bonds and *Specialties* are no assets, until the money is paid. 1 *Ventr.* 96. (*g*)

If an executor recovers damages in trespass for *goods taken away in the life of the testator;* this (when recovered) shall be assets: because he recovers it as executor. 1 *Roll's Abr.* 920.

If an executor recovers (as executor) things in *chancery* by equity; these things so recovered shall be assets. 1 *Roll's Abr.* 920.

A debt due from an executor to a testator, is assets in equity to pay legacies. 3 *Cha. Ca.* 89.

The interest which a master hath in a *servant* is not assets in the hands of an executor; for a servant whose master is dead, is legally discharged, and is not servant either to the heir or executor; but meet and honest it is, that one of them continue him in service, till a fit time of providing for him a new master; and fit for him, not to depart suddenly. *Went.* 55.

(*g*) A *Power* unless executed is not assets for debts. 7 *Ves.* 499.

But the interest which one hath in an *apprentice*, is a chattel personal, and shall go to the executors. *Law of Test.* 378, 379. *Went.* 55. 2 *Bac. Abr.* 416. 443.

T. 17 *C.* 2. *Walker* and *Hall.* An action was brought against the executor, upon the covenant of the testator to teach an apprentice his trade; and after verdict for the plaintiff, it was moved in arrest of judgment, that this covenant was personal to the testator, and did not oblige the executors, but only obliged the master during his life, to teach the apprentice. But by the court: it obliged the executors also, and they ought to see the apprentice taught his trade; and if they be not of the trade, they ought to assign him to another that is of the trade, so that he may be taught according to the covenant. And judgment was given for the plaintiff. 1 *Lev.* 177. [338]

The interest in the liberty of a *prisoner* in execution for debt is a chattel personal, and shall go to the executors. *Law of Test.* 378. 2 *Bac. Abr.* 416.

If an executor puts in suit a bond of 100*l.* for performance of covenants, and the parties submit to an *award*, and it is awarded that the obligor shall pay 70*l.* in full satisfaction, and that the executor shall release, which is done accordingly; it is said, that the executor shall be taken to have assets to the value of the whole 100*l.*: and though by the award he was compelled to release, it was his own act to submit to the arbitrament. 3 *Leon.* 53. (*h*)

A *reversion* expectant upon an estate for life, is assets in the hands of the heir: but the creditor cannot compel the heir to sell it, but must wait till it falls. 1 *Abr. Eq. Cas.* 275.

In what case the lands and the personalty shall be charged in aid of each other.

9. If there be a debt due to the king, equity will order it to be paid out of the real estate, that the other creditors may have satisfaction for their debts out of the personal estate. 1 *Vent.* 455.

A mortgage is a charge upon the personal estate, as well as upon the lands mortgaged; and the personal estate is primarily liable: for a mortgage is a general debt, and the land is only as security. 1 *Atk.* 487.

If one dies indebted by mortgage and simple contract, and one of the simple contract creditors gets judgment of assets when they shall happen, and the executor applieth the assets to pay off the mortgage; the simple contract creditors shall stand in the place of the mortgagee, as to what he hath exhausted out of

(*h*) If an arbitrator, under a reference between *A.* and *B.*, an administrator, award that *B.* shall pay a certain sum as the amount of *A.*'s demand, *B.* cannot afterwards object that he had no assets, but may be attached for non-performance. *Worthington* v. *Barlow*, 7 *T. Rep.* 453.

the personal assets: and this being only by aid of equity, all the simple contract creditors shall come in equally with the creditor that hath judgment. *Wilson* and *Fielding*, *M.* 1718. 2 *Vern.* 763.

So in the case of *Haslewood* and *Pope*, *T.* 1734; it was decreed, that if a man deviseth his lands to trustees to pay all his debts, and dies indebted by specialty and simple contract, and the bond creditors recover part of their debts out of the personal estate, and afterwards they apply to be paid the rest of their bond debts out of the real estate devised for that purpose; in this case, as the testator intended all his creditors should be equally paid their debts, the bond creditors shall not come in upon the land, until the simple contract creditors have received
[339] so much thereout, as to make them equal, and upon the level with the bond creditors, in respect of what they received out of the personal estate. It was also decreed, that where one gives a specific, or even a pecuniary legacy, and deviseth lands to pay his debts; if a simple contract creditor comes upon the personal estate, and exhausts it so far, as to break in upon the specific or pecuniary legacy, these legatees shall stand in the place of the creditors to receive their satisfaction out of the fund raised by the testator for the payment of their debts. But where a man dies indebted by bond, and leaves a personal estate, and deviseth lands to one in fee, and gives specific legacies, and the creditor by bond comes on the personal estate to be paid his bond; the specific legatees shall not stand in the place of the bond creditor, to charge the land devised, because the devisee of the land is as much a specific devisee, as the legatee of a specific legacy. And in this cause the lord chancellor said, that the personal estate is the natural fund for payment of debts, and which as against creditors, unless they please, the testator cannot exempt; but against the devisee of his land he may, by appropriating his land as a fund for payment of his debts; but even in that case, according to the general rule, there ought to be express words to exempt the personal estate from the debts, or at least very plainly shewing this to have been the intention of the testator. 3 *P. Will.* 322.

So where a man deviseth all his freehold houses, lands, and hereditaments, to trustees, to hold to them in trust, that the freehold estate should be subject to, and be sold and disposed of by them, for payment of his just debts; and after disposing of some particular legacies, he gave to his nephew the rest and residue of his goods, chattels, debts, rights, credits, and personal estate not before disposed of. Hereupon the question was, whether the personal estate should be first applied to the payment of the debts, notwithstanding the real estate was expressly devised for that purpose. The counsel for the defendants (who were the

trustees and residuary legatee) insisted, that the real estate being not only made subject, but directed to be sold for payment of the debts, the personal estate should not be applied for that purpose. But by the whole court of exchequer, Here being no negative words to exclude the personal estate from being applied for the payment of debts, that ought first to be applied for the benefit of the heir at law (who was the plaintiff); and decreed accordingly. *Bunb.* 302.

And by the lord chancellor *Hardwicke*, in the case of *Walker* and *Jackson*, July 22, 1743: upon a rehearing at Lincoln's inn hall. The general rule is, that the personal estate shall be first charged with payment of debts and legacies, and the testator cannot exempt it from being liable to his debts, as against creditors; but as between heir and executor, he may charge them upon any other fund which is not primarily liable, and discharge the personal estate. There are several ways, by any of which a man may give his real estate for payment of his debts; as, first, to trustees; secondly, by way of charge in equity, which the court of chancery will decree to be performed; or, thirdly, he may direct that his real estate may be sold for the payment of his debts: but let him do which way he pleases, none of these ways will make the real estate first chargeable, if there be not in the will, either express words, or a manifest intent to discharge the personal estate, but it shall be first liable. *Bunb.* 302. 1 *Wilson* 24. [340]

And in the case of *Bridgman* and *Dore*, Nov. 27, 1744: By the lord chancellor *Hardwicke*: I know of no authority where the words, "I make my real estate liable to pay my debts," will exempt the personal estate without any special exemption of personal estate. Nor has the court ever said, that personal estate shall be applied only to pay legacies, and not the debts. Nor will making a particular estate in land liable to pay debts exonerate the personal estate, because it is the natural fund for payment of debts. Suppose a man deviseth a real estate liable to the payment of debts, and subject to those debts gives it over to another, or what remains after the payment of debts, which is all one; if there are not express words to exempt the personal estate, it shall be first applied in exoneration of the real estate. 3 *Atk.* 202. (*i*)

(*i*) *Per* lord *Thurlow* C. Two rules have been established on this subject: 1. That the personal estate is liable, in the first instance, to the payment of debts. 2. That a declaration plain shall stand in lieu of express words to discharge it, if such appear to be the testator's intention. *Duke of Ancaster* v. *Mayer*, 1 *Bro. C. C.* 454. *Watson* v. *Brickwood*, 9 *Ves.* 447. [The rule respecting the order of marshalling assets seems to be this: 1st, *The per-* [Marshalling assets.]

In what case both executors

10. In an action of debt against two executors, if they plead severally by several attornies fully administered, and the jury find

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sonal estate of a mortgagor shall be applied in discharge of the mortgage debt; but not in exoneration of the real estate mortgaged as against pecuniary or specific legacies or debts, though it must as against an *executor* or *residuary legatee;* though the mere charging an estate with, or creating a term for payment of debts, will not alone create such an intention of exempting the personal estate. 2dly, *Ordinarily speaking, estates* devised *for payment of debts.* If lands are devised to *trustees* for payment of debts, simple contracts and specialties shall be paid in proportion; and though the trustees are creditors or sureties for testator, they shall not prefer themselves. *Anon.* 2 *Ch. C.* 54. But if lands are devised to an *executor*, they become legal assets, and shall be paid in a due course, according to their superiority at law. *Hixton* v. *Witham*, 1 *Ch. C.* 248. *Girling* v. *Lee*, 1 *Vern.* 63. 3dly, *Estates* descended; *and this too where the mortgaged estates devised are subject to a general charge for payment of debts.* 4thly, *Real estates specifically devised, subject to or generally charged with the payment of debts.* Though a general charge of debts on a devised estate will not prevent the previous application of an estate descended, yet if the devised estate is selected and appropriated to the debts, it is liable before the estate descended; but this arrangement does not bind the creditors. *Manning* v. *Spooner*, 3 *Ves.* 114.

This rule in marshalling assets is of such consequence to the practice of the court, that it ought to countervail any arguments of hardship to particular persons. *Galton* v. *Hancock*, 2 *Atk.* 439.]

It frequently happens that a variation of charge from the real to the personal estate, or the reverse, may be gathered from the parts of the will. *Hone* v. *Medcraft*, 1 *Bro. C. C.* 260., *with the cases cited.* Under the following devise, "As to all my worldly estate, I desire all my just debts should be first paid, it was decreed, that on failure of the personal estate, copyhold lands were liable as well as freehold." *Coombes* v. *Gibson*, 1 *Bro. C. C.* 273. [Under a devise to sell and pay debts and funeral expences, the personal estate was held to be exempt without express words upon the evident intention. *Burton* v. *Knowlton*, 3 *Ves.* 107. But to exempt the personal estate under a devise for payment of debts, the intention must plainly appear on the will, and the court cannot look to *intrinsic* circumstances. *Brummet* v. *Prothero*, 3 *Ves.* 111. Where the testator directed, "that all his legal debts, legacies, and funeral expences should be fully paid," it was held not sufficient alone to charge legacies on real estates specifically devised, for the intent must be clear, to induce the court to marshall assets in favour of legatees. *Kightley* v. *Kightley*, 2 *Ves. jun.* 328. *Keeling* v. *Brown*, 5 *Ves.* 359. [Simple contract debts are not charged on a real estate by a will, first devising that all testator's debts and funeral expences might be satisfied and paid by his executors, and then devising all the real estates specifically. *Powell* v. *Robins*, 7 *Ves.* 209. But real estates devised were held liable to simple contract debts, under a direction in the beginning of a will

that the one hath assets, and that the other hath not any assets, the judgment shall be only against him who is found to have assets, and that the other who had not assets shall go quit. 1 *Roll's Abr.* 929. **shall be charged, where one only hath assets.**

But where two executors join in an acquittance, but one only receives the money, both are chargeable for it as to creditors, who are to have the utmost benefit of the law: but the actual receiver (it is said) is only chargeable as to legatees or persons claiming under distribution; for the substantial part is the actual receiving of the money, and this only is regarded in conscience. By *Harcourt* lord chancellor. *M.* 12 *An. Churchill* and *Hopson*, 1 *Salk.* 318. (*k*)

Where an executor has once received money, assets of his testator, he cannot discharge himself under the plea of *plene administravit* to an action by a bond creditor of his testator, by shewing that he paid the money to his co-executor, even for the purpose of satisfying the bond creditor, who had applied for payment to such co-executor; if the co-executor afterwards misapply the money by retaining it to satisfy his own simple contract debt. *Crosse* v. *Smith*, 7 *East's Rep.* 246.

An executor does not make himself answerable for the receipts of his co-executor, merely by taking probate, permitting him to possess the assets, and joining in acts necessary to enable him to administer, but if he goes further, and concurs in the application, he is answerable. *Hovey* v. *Blakeman*, 4 *Ves.* 596.

11. Generally, if the debts are in *equal degree;* the executor may give the preference unto which he will. 10 *Mod.* 496. (3) **What debts to be first satisfied.**

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that debts and funeral expences shall be first paid, and that which descended to the heir by failure of devise to be first applied. *Williams* v. *Chitty*, 3 *Ves.* 545. There is no difference between debts and legacies in an implied charge on a real estate by will. S. C. 3 *Ves.* 551.]

(*k*) S. P. By lord *Northington* C. *Westley* v. *Clarke*, reported in Mr. *Cox*'s note to 1 *P. Wms.* 83. See also *Leigh* v. *Barry*, 3 *Atk.*, where lord *Hardwicke* takes a difference between *trustees* and *executors*, *viz.* that the former, though they all join in receipts, shall only be liable for what they receive individually, because they are obliged to join for conformity, but otherwise as to executors who may act severally if they think fit. Where by a voluntary joint act of executors, the testator's money gets into the hands of one of them or a stranger, they shall all be liable. *Sadler* v. *Hobbs*, 2 *Bro. C. C.* 114. *Scurfield* v. *Howes*, 3 *Bro. C. C.* 90. *Murrel* v. *Cox and Pitt*, 21 *Vin. Ab.* 534. But that a party's signing a *receipt* is not in all cases *conclusive* evidence against him of the receipt of money, even at law, appears by the above-mentioned cases, and *Straton* v. *Rastal*, 2 *T. Rep.* 366.

(3) Rent incurred in testator's lifetime, though reserved on a parol lease, shall be paid before bond debts. *Willet* v. *Earle*, 1 *Vern.* 490. Where the representative of an intestate is seeking to give preference

So that if all the goods are but 20*l*., and debts are due to two by obligation, each of 20*l*.; the executor may pay which of the two he will. *Br*. Executor, 172.

But in this case the chancery will sometimes interpose: because this power may be an inlet to fraud. 10 *Mod*. 496.

Retainer. In like manner, the executor may allow unto himself his own
[342] debt in prejudice of other debts in equal degree; provided that he hath made an inventory, and provided he be not executor of his own wrong. *Swin*. 459. 2 *Bac. Abr*. 435. (But an executor of his own wrong shall not in any case be permitted to retain. *Blackst*. B. 3. *c*. 2.)

And this remedy of retainer is by mere act of law, and grounded upon this reason; that the executor cannot, without an apparent absurdity, commence a suit against himself as representative of the deceased, to recover that which is due to him in his own private capacity; but, having the whole personal estate in his hands, so much as is sufficient to answer his own demand, is, by operation of law, applied to that particular purpose. Else, by being made executor, he would be put in worse condition than all the rest of the world besides. For, though a rateable payment of all the debts of the deceased, in equal degree, is clearly the most equitable method, yet as every scheme for a proportionable distribution of the assets among all the creditors hath been hitherto found to be impracticable, and productive of more mischiefs than it would remedy, so that the creditor who first commenceth his suit is intitled to a preference in payment; it follows, that as the executor can commence no suit, he must be paid the last of any, and of course must lose his debt, in case the estate of his testator should prove insolvent, unless he be allowed to retain it. (4) But the executor shall not retain his own debt, in prejudice to those of a higher degree; for the law only puts him in the same situation, as if he had sued himself as executor, and recovered his debt; which he never could be supposed to have done, while debts of an higher nature subsisted. 3 *Blackst*. B. 3. *c*. 3. (*l*)

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by confessing judgments, the court will give plaintiff leave to proceed at law to recover judgment with a *cesset executio*, and in equity for a discovery and account of assets. *Baker* v. *Dumaresque*, 2 *Atk*. 119. *Barn. Ch. R*. 277.

(4) Nor is he obliged to take in part where there are not assets enough to pay the whole. *Robinson* v. *Cummings*, 2 *Atk*. 411.

(*l*) In debt on bond against an administrator to which he pleads debt on bond due to himself and retainer, it is not necessary to aver a good consideration for the bond, for if it can be impeached, the matter must be replied. Nor is it necessary for the administrator to set out in his plea the letters of administration, for the plaintiff, by bringing the action, has admitted him to be lawful administrator. *Picard* v. *Brown*, 6 *T. Rep*. 550.

But if the debt of one creditor be payable at a future day, and of another creditor presently; the executor cannot prefer such future debt, and pay it before the day of payment comes, and leave the other unpaid. But after the day happens, he may prefer either; unless in case of a suit commenced before the day. *Went.* 142. [343]

But amongst executors themselves, or joint administrators, one executor or administrator may not prefer his own debt before the debt of another executor or administrator, being in equal degree. Thus in the case of *Chapman* and *Turner*, in chancery, Feb. 26, 1738, two bond creditors, A. and B., took joint letters of administration, A. got into his hands best part of the assets, and retained for his own debt against B. On a bill for an account, the question was, whether A. by this had got such a legal advantage, as to be intitled to keep the assets, and so B. lose his debt. By the master of the rolls: The rule of this court in cases of retainer is, unless the party can shew a legal cause to retain, we never give it him; if he can shew a legal right, we never take it from him. The question then is, whether at law this be a good retainer. At law, no doubt, an executor or administrator hath a right, in case of debts in equal degree, to prefer one to another, and to retain for his own in the first place against any other creditor; and the reason is, because if a retainer were not allowed, an executor in case of a deficiency of assets would have no possible way of obtaining satisfaction for his debt; for at law there is no such thing as splitting of debt, or making a rateable proportion, and therefore he cannot come in upon an average with the rest of the creditors, nor has the advantage of another creditor, who by bringing his action in due time may recover his debt, though there be not enough assets at last to answer all demands upon the testator; for he cannot sue himself. So that this privilege of retainer is founded on the policy of the common law, that executors may not be deprived of one advantage without having another in lieu of it, and that they may not be in a worse condition than all mankind besides. But this is not a case between an executor or administrator, and a creditor; but between two joint administrators, who are both in the same condition in all respects. No authority hath been cited in this case, to support a retainer by one administrator against the other, nor do I see how there ever could be one; because an administrator can bring no sort of action against his companion, wherein this point might have been settled at law. Neither doth the reason of the law justify such a retainer, for administrators are considered but as one person in law; the possession of the one is the possession of the other; the receipt of one is the receipt of the other; and therefore the retainer of one must be considered as the retainer [344]

of the other; and must enure for their mutual benefit in the discharge of the debts of both in proportion. Then the consequence would be very bad, were a retainer allowable in this case; for administrators must fight for the assets, if getting the sole possession would intitle either to a separate right in them. So that, as no legal right of retainer has been shewn, the rule must take place, that he who cannot retain in law cannot in equity. The plaintiff is intitled to an equal distribution of the assets, being an equal creditor, according to conscience and equity; and the defendant must be decreed to account. *Viner*, *Executors*, D. 2.

[A right of retainer is not prejudiced by the circumstance, that the administration is granted to another for the use of the creditor, a lunatic, nor that it is granted to another *durante minoritate*, nor that the debt is due to a *trustee*. *Franks* v. *Cooper*, 4 *Ves.* 763.]

Another difference, where debts are in equal degree, is said to be, that regularly that debt shall be paid first for which suit is commenced, and not that for which no suit is commenced; for after a suit begun, the executor (it hath been holden) may not excuse himself by any voluntary payments. 2 *Cha. Ca.* 201. 2 *Vern.* 62.

Yet it is said, that the executor, before notice of such suit, may pay any other creditor in equal degree; and then plead, that he hath fully administered before notice. *Br. Executors*, 43. *Went.* 146.

And in the case of *Mason* and *Williams*, it was held by *Cowper* lord chancellor, that pending a bill in equity against an executor, or after a decree *quod computet*, an executor may pay any other debt of a higher nature, or as high a nature, if there be *legal* assets; but if he hath only *equitable* assets, then the court of chancery will not indemnify him, and suffer him to prejudice and disappoint the first suitor. 2 *Salk.* 507.

If there be two creditors in equal degree, and both sue; if the executor doth by covin help the creditor which began his suit last to his judgment or execution first, and there be no assets left to pay the other creditor, he must be satisfied out of the executor's own estate, if this covin be proved against him. But the confession of an action by the executor, where there is a real debt, is no covin: and such recovery by confession is a good plea for the executor against another creditor. *Swin.* a.
[345] 459. (*m*)

(*m*) But where debt on bond was brought against an administrator, and he pleaded a judgment confessed to an action on a simple contract, without averring "that he had no notice of the plaintiff's demand," the plea was holden to be bad, because it would enable an administrator, in many cases, to defeat a specialty creditor by con-

In the case of *Joseph* and *Mott*, *M.* 1697, a man made his will, and died indebted to several persons by bond, more than his personal estate would pay. A bond creditor brought a bill against the executor, to have a discovery and account of the personal estate, and a satisfaction for his debt. At the hearing, the executor made default; so there was a decree against him for an account and satisfaction out of the assets, unless cause shewed: Before the decree was made absolute, another bond creditor of the testator brought an action at law against the executor, upon a bond. He appeared, and because he could not plead this decree at law, suffered judgment to go against him by default. And the account being carried on before the master, it was doubted whether he should allow this judgment on the account. The master of the rolls was of opinion, that the decree must be preferred. And it coming to be reheard before the lord chancellor, he was of the same opinion. *Prec. Ch.* 79.

But in the case of *Darston* and the *Earl of Orford*, *H.* 1701, after a bill filed in chancery against an executor for a discovery of assets, and answer put in, the executor *voluntarily* paid a bond debt without suit. The cause proceeded to a hearing, and an account was decreed. And the question was, whether this voluntary payment, pending a suit here, should be allowed on the account. And the lord keeper *Wright* thought the payment ought to be allowed; but this being a point of consequence, he ordered precedents to be searched. Afterwards, 3d June, 1702, on precedents produced on both sides, his lordship seemed to be of the same opinion; but said the case of *Joseph* and *Mott* was a precedent against him, but thought that to be a direct change of the law. The next day (upon consideration of the precedents) his lordship said he was bound up by them, and therefore decreed the payment (being voluntary) to be disallowed; but seemed to disapprove of the case of *Joseph* and *Mott*, where the judgment at law was fairly obtained. Afterwards, 21st Nov. 1702, this decree was reversed in the house of lords, and the payment allowed. *Prec. Cha.* 188. 3 *P. Will.* 401.

So in the case of *Waring* and *Danvers*, *M.* 1715, the plaintiff, a simple contract creditor of the testator, brings an action on a special original against the executor, in order to recover his debt. The other simple contract creditors offered the plaintiff to come in for his proportion of his debt with them; but having first filed his original, he insisted on his whole debt, in preference to the rest. Upon which, the executor and the other simple contract creditors entered into articles, agreeing, that first the ex- [346]

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fessing as many judgments as he pleased on simple contract debts. *Sawyer* v. *Mercer*, 1 *T. Rep.* 690.

ecutor should be paid his debts, and then that all the simple contract creditors should equally share the assets amongst them, exclusive of the plaintiff. And in order to bar the plaintiff at law, the executor gave judgment in the several *quantum meruits* brought by the other simple contract creditors, for the several sums which were laid as damages in the declarations, without ascertaining the damages by writ of inquiry, but those damages were so laid as not to exceed the real debt. Upon this, the plaintiff brought his bill. But the master of the rolls dismissed the bill without costs, it being a hard case; but afterwards, on consideration, he gave costs. And the decree was affirmed by the lord chancellor. The master of the rolls said, if the plaintiff desired it, he would send it to the master to see whether the judgments confessed to the other creditors be more than their real debts; but the plaintiff not thinking it worth his while, the court decreed as above. 1 *P. Will.* 295.

In the case of *Barker* and *Dumeres*, Jan. 29, 1740. Robert Dumeres died intestate, and on his death, Edward Dumeres, who was a relation of his, applied for administration. Barker, who was a creditor of Robert by bond, opposed the granting of administration to Edward, by reason of his insufficiency, and his intention of going over to Jersey. However, administration was granted to him. This administration was in some measure granted to Edward by the leave of this court. Barker had entered a caveat against its being granted to him, though that caveat was afterwards withdrawn. But as there were these objections against him, Barker filed his bill against him the 31st of October last, for the payment of his debt; and prayed that he might give security to abide that determination. His answer came on the 27th of the next month; and an order was made that he should find such security, which he accordingly did. After this Merry, who was another bond creditor to the intestate, brought his action at law against Edward, and Edward confessed [347] a judgment to him in Michaelmas term in that same year, in 4000*l.* This occasioned Barker's bringing his action at law against Edward, upon the same bond for which the bill was brought here; in order that Edward might not confess judgment to other persons, before he could get judgment against him. As soon as this action was brought, a motion was made on the part of Edward, praying that Barker might make his election which court he would proceed in, whether at law or in equity. — By the lord chancellor *Hardwicke:* It is very true, that it is the general rule of this court, that a person shall not be allowed to proceed both at law and in equity for one and the same demand, at one and the same time. But notwithstanding that, it is as certain, that by the ancient course of the court, a person was allowed to bring his action at law against the representative of the

deceased, and at the same time to bring his bill here in order to have a discovery of assets; though now it is established, that if the party proceeds in equity against such representative, his bill must be both for a discovery of assets and a satisfaction for his debt; and he shall not be allowed to proceed both at law and in equity. And where the party has proceeded in both courts, several orders have been requiring him to make his election. But where the court sees that the representative is confessing judgments, that is a reason (and in my judgment shall always be a reason) that the court will not require the party to make his election. The courts of law distinguish the case of executors, in instances similar to this, from other cases. Therefore though the constant course of those courts is, on reasonable circumstances, to give a defendant farther time to plead than he is obliged to plead in by the strict rule of the court; yet when an executor applies for this favour, the time for pleading shall not be enlarged but by his consenting not to confess judgments in the meantime. 'Tis indeed true, that an executor in some instances may honestly confess judgments to other creditors; as where he does it to prevent his being doubly charged, or the like: but when this court sees that he doth this in order to elude its orders, the court will never permit it. Now what is the nature of the present case? The original bill was filed the 31st of October last. The answer of Edward came in on the 27th of November following. And in the beginning of Michaelmas term here is a judgment confessed by Edward to Merry, in 4000*l*. The administration itself was in some measure granted to Edward by leave of this court. Barker [348] had entered a caveat against its being granted to him, though that caveat was afterwards withdrawn. The proper order for the court to make in this case is, that Barker made a special election, namely, to proceed at law to recover judgment there, and to proceed in this court for a discovery, and an account of assets, but that he shall not be at liberty to take out execution upon the judgment without leave of this court. And it was ordered accordingly. *Barn. Cha. Ca.* 277.

Burying in woollen.

12. The forfeiture for not burying in woollen, by the statute of the 30 *C.* 2. *c.* 3., is now repealed.

Funeral expences.

13. Next the funeral expences shall be paid.

But in *Shelly's* case, *T.* 5 *W.*, it is said, that in strictness, no funeral expences are allowed against a creditor, except for the coffin, ringing the bell, parson, clerk, and bearers' fees; but not for pall or ornaments. 1 *Salk.* 196. Perhaps the expences of the shroud, and digging the grave, ought also to have been added.

In general, it is said, that no more than 40*s*. for funeral expences, shall be allowed against creditors. 3 *Atk.* 249. (*n*)

(*n*) By lord *Hardwicke* C. At law, where a person dies insolvent,

Overseer of the poor dying.

14. By the statute of the 17 *G.* 2. *c.* 38. If any overseer of the poor shall die, his executors or administrators shall, within forty days after his decease, pay out of the assets all money remaining due, which he received by virtue of his office, before any of his other debts are paid. § 3.

Charges of probate or administration.

15. Next to these, as it seemeth, come the charges of the probate of the will, or of the letters of administration.

Debts due to the king on record.

16. Next, debts due by the testator to the king are to be discharged; and it is not in the choice of the executor to prefer any other debt due to any subject. *Swin.* 455.

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Which must be understood of such debts as are due to the king only by matter of record, and not of sums of money due to the king upon wood-sales, or sales of his minerals, for which no obligation is given: or of amercements in his courts baron or courts of his honours, which be not courts of record; or of fines for copyhold estates there; or of forfeitures to the crown of debts by contract due to any subject by outlawry or attainder, until office thereupon found. *Swin.* a. 455, 456. 2 *Bac. Abr.* 432.

Debts due to the post office.

17. By the statute of the 9 *An. c.* 10. Debts due to the post-office for letters, shall be preferable in payment before any debt due to any private person. § 30.

Judgments.

18. Next, debts due to private persons upon judgments against the deceased in his life; and, after those, debts upon judgments (although by mere confession, and without defence) against the executor or administrator for the debts of the deceased. *Law of Ex.* 39. *Treatise of Eq.* 112. *b.* 4. *pt.* 2. *c.* 2. § 2.

But it is said, that the executor is not bound to take notice of judgments against the testator in his life, without being made acquainted therewith by the creditors; for the executor is no way privy to his acts. 1 *And.* 159.

But in the case of *Littleton* and *Hibbins, M.* 42 *El.*, it was adjudged, that executors at their peril ought to take notice of debts upon record. *Cro. El.* 793.

In the case of *Patterson* and *Huddleston, T.* 2 *G.* 2., an action of debt upon a bond was brought against the defendant as executor. The defendant pleads a recovery against him already had in a plea of debt, and that he had no notice of this bond at that time, and that there was no more in his hands than would

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the rule is, that no more shall be allowed for a funeral than is necessary; at first only 40*s.*, then 5*l.*, and at last 10*l.* But the executor here having had reasonable ground to believe the estate solvent, from the large legacies left by the testator, and it not being clear that, upon the whole, there would be a deficiency, his lordship allowed 60*l.* for the funeral expences, the testator having directed that he should be buried thirty miles from the place of his death. *Stag.* v. *Punter*, 1 *Atk.* 119. In *Bull. N.P.* 143. it is said the usual method is to allow 5*l.* [See tit. Burial, note (S).]

satisfy this recovery. Upon this the plaintiff demurs. The court observed, that it did not appear but that this recovery might be in debt upon bond, or other matter of as high nature, and then undoubtedly the plaintiff ought to be barred. But however, if the recovery was upon a simple contract, they were unanimously of opinion, if the defendant had no notice of the bond, that the recovery would be a good bar. They said, in this consists the difference between duties of a private nature, and duties upon record; for those executors are bound to take notice of at all events, but these they need not, where a suit is commenced against them to recover debts of an inferior nature. They said also, that there is no occasion that executors should hold out a suit to the last, before they make such payments; but if an action is taken out against them, it is the same. But if an [350]
executor makes a voluntary payment of a debt by simple contract, where there are not assets to satisfy the bond debts, it is otherwise, though he hath no notice; for there are many cases, where a man's voluntary act shall prejudice him, where the necessity of law would not. Upon the whole, judgment was given for the defendant. 1 *Barnard.* 186.

If the judgment is satisfied, and is only kept on foot to wrong other creditors, or if there be any defeasance of the judgment yet in force; then the judgment will not avail to keep off other creditors from their debts. *Swin.* a. 456. 2 *Bac. Abr.* 433.

And of two judgments, he who first sues execution must be preferred; but before, it is at the election of the executor to pay which he will first: Only a judgment in a foreign country, as France, is to be considered but as a simple contract. *Treat. of Eq. b.* 4. *pt.* 2. *c.* 2. § 2. *Swin.* a. 436.

And it is not necessary that the judgment be limited to the courts at Westminster; but if it be obtained in any court of record, which hath power to hold plea by charter or prescription of debt above 40*s*., it is sufficient. For though upon such a judgment execution cannot there be had, but of such goods as are within the jurisdiction of that court; yet if the record be removed into chancery by a certiorari, and there by mittimus into one of the benches, then execution may be had upon any goods in any county of England. *Swin.* a. 456.

But a judgment not *doggeted*, as by the 4 & 5 *W. c.* 20., shall not affect any lands as to purchasers or mortgagees; or have any preference against heirs, executors, or administrators, in the administration of the estates of their ancestors, testators, or intestates.

Which act, in order to render more easy the finding of such judgment entered, directs in what manner alphabetical lists shall

be made of judgments by confession, *non sum informatus*, or *nihil dicit*, in any of the courts of record at Westminster; to which any person may resort, on paying 4*d*. and no more. (*o*)

[351] Decree in equity.

19. In the case of *Harding* and *Edge*, *H.* 1682, in the chancery. Upon a special report, the sole question was, how a duty decreed should take place in relation to other debts in point of priority of satisfaction; and ordered that a decree should precede debts on simple contracts and bonds, and take place next to judgments. 1 *Vern.* 143. (5)

But in the case of *Peploe* and *Swinburn*, *M.* 1719. In the exchequer. It was decreed, that creditors by judgment at law, and creditors by decree in equity, shall be paid equally without any preference. *Bunb.* 48.

And it has now become the established doctrine, that a decree of the court of chancery is equal to a judgment in a court of law. (6) So where an executrix, whose testator was greatly indebted to divers persons in debts of different natures, being sued in chancery by some of them, appeared and answered immediately, admitting their demands (some of the plaintiffs being her own daughters); and others of the creditors sued the executrix at law, where the decree not being pleadable, they obtained judgments; yet the decree of the court of chancery, being for a just debt, and having a real priority in point of time (7), not by fiction and relation to the first day of the term, was preferred in the order of payment to the judgments, and the executrix protected and indemnified in paying a due obedience to such decree, and all proceedings against her at law stayed by injunction. Case of *Morris* against the *Bank of England*. Decreed first at the rolls by sir *Joseph Jekyll*, in Aug. 1735. Which was affirmed by the lord *Talbot*, in Nov. 1736. And his lordship's decree affirmed in parliament in May 1737. 3 *P. Will.* 402. *Cas. Talb.* 217.

In the case of *Turwin* and *Gibson*, July 31, 1749; where a

(*o*) A debt on judgment not docketed according to the directions of this act, is put by it on a level with simple contract debts. Therefore, on a plea of *plene administravit* to debt on a judgment obtained against the intestate, but not docketed, the administrator may give in evidence payment of bond and other specialty debts which exhausted the assets. *Hickey* v. *Hayter*, 6 *T. Rep.* 384. And an outstanding judgment against a testator or intestate, not docketed, cannot be pleaded by an executor or administrator to an action on simple contract. *Steel* v. *Rorke*, 1 *Bos. & Pul.* 307.

(5) An administrator, having paid away all the assets in satisfying specialty debts, was decreed to pay a debt due on decree before he had paid those debts. *Searle* v. *Hall*, 2 *Vern.* 37. *Searle* v. *Lane*, 2 *Vern.* 88. S. P. *Bishop* v. *Godfrey*, *Pre. Ch.* 179.

(6) *Bishop* v. *Godfrey*, *Pre. Ch.* 179. S. P.

(7) *Joseph* v. *Mott*, *Pre. Ch.* 79. S. P.

sum was decreed to the plaintiff, it was ruled by lord *Hardwicke*, that the solicitor in the cause, for his trouble and money disbursed for his client, had a right to be paid out of the sum decreed; and that in this case the administrator cannot apply the assets in the course of administration. And this, he said, is the constant rule in chancery. 3 *Atk.* 720.

20. Next, debts upon recognizances at common law. *Law of Ex.* 39. [352]

Recognizances and statutes.

And debts upon statutes merchant or staple, or recognizances in nature of a statute staple. *Law of Ex.* 39.

And these recognizances and statutes standing in equal degree, it is at the executor's election, to give precedency to which he will. *Swin.* a. 457. 2 *Bac. Ab.* 434.

Neither between one statute and another doth the time or antiquity give any advantage as touching the goods, though touching the lands of the conusor it doth. But as for the goods in the hands of the executor, he who first seizeth them by execution is preferred; and before suing of execution, the executor may give precedency to which he will. *Swin.* a. 457.

But amongst statutes and recognizances, those which are forfeited shall be preferred before those which are for the performance of covenants, not broken. *Swin.* a. 457.

And these, before they are broken, do not take place of specialties. *Treat. of Eq.* 112.

Mortgages.

21. In the case of the *Earl of Bristol* and *Hungerford*, *M.* 1705, it was first decreed at the rolls, that mortgages were to be paid in the first place, and then judgments, and then recognizances: But upon an appeal to the house of lords, it was adjudged, that mortgages are not to be preferred to other real incumbrances: but that mortgages, statutes, and recognizances, shall take place according to their priority, and as they stand in order of time. 2 *Vern.* 524.

If an estate is devised in trust for payment of debts, a mortgagee who lent a further sum upon bond, shall not be allowed to tack it to his mortgage in preference to creditors. 3 *Atk.* 630.

So where a person claims the equity of redemption, as a purchaser for a valuable consideration, without notice of the mortgage; the mortgagee cannot tack his bond to it, and can only have it out of the general assets of the mortgagor. 3 *Atk.* 659.

But if a mortgagor, after making a mortgage, borrows money of a mortgagee upon bond, and the mortgaged premises descend upon an heir at law, or come to a volunteer; the court will not suffer them to redeem the mortgage, without paying the bond: and this is to prevent a circuity; because the moment the estate descended, or came to the volunteer, it became assets, and liable to the bond. And the same rule will hold, as to a devisee of [353] the mortgaged premises. 3 *Atk.* 630. 659.

Rent, bonds, and other obligations.

21. Next, debts by specialty, as those by bonds or other obligations, sealed by the testator. 2 *Bac. Abr.* 434.

Also rent arrear, and unpaid by the testator, is equal to a debt by specialty; for this savouring of the realty, the executor can no more wage his law against such a debt, than he can to a debt by specialty. 2 *Bac. Abr.* 434.

So where debt was brought against an executor for rent reserved on a parol lease, after the lease was determined, and the executor pleaded that the testator entered into an obligation, and that he had not assets above 5*l.*, which were not sufficient to discharge this obligation; on demurrer it was resolved, that this rent, though reserved on a parol lease, was yet equal to an obligation, and that it still remained in the realty, though the term was determined. 2 *Bac. Abr.* 434.

Also by the custom of London, if a citizen of London dies indebted by *simple contract*, such debt is equal to a debt by specialty. 2 *Bac. Abr.* 434.

E. 1715, *Parker* and *Harvey*. The grantor's *covenant* in a marriage settlement for him and his heirs, that the premises were free from incumbrances, shall come in equally with creditors on bond. *Vin. Executors*, Q. a. 39.

If two men are *partners* in trade, and one of them gives a bond to leave his wife 1000*l.*, and dies, and the other partner administers; if the wife would be paid out of the separate estate of her husband, on there being effects, she shall have a preference before other creditors; but if there is no separate estate, and the wife would have satisfaction out of the partnership effects, then all the partnership debts must be first paid. 3 *P. Will.* 182.

Any *voluntary* bond is good against an executor or administrator, unless some creditor be thereby deprived of his debt: Indeed, if the bond be merely voluntary, a real debt (though by simple contract only) shall have the preference. But if there be no debt at all, then a bond, however voluntary, must be paid by an executor. 3 *P. Will.* 222. *Comyns*, 255.

A man, having a wife who lived separate from him, afterwards married another woman who knew nothing of the former wife's being alive; but it being discovered to the second wife that the
[354] former was alive, the husband (in order to prevail with the second wife to stay with him) some years afterwards gave a bond to a trustee of the second wife, to leave her 1000*l.* at his death, and died, not leaving assets to pay his simple contract debts: If this bond had been given immediately on the discovery, and they had parted thereupon, it had been good; but being given in trust for the second wife, after such time as she knew the first was living, and to induce her to continue with the husband, this was worse than a voluntary bond, and decreed to be postponed to all the simple contract debts. But if such bond had

been given to the second wife as a recompence for the injury done her, and thereupon she had left the husband, it had been a good bond, and to be paid before any simple contract debts. 3 *P. Will.* 339. 349.

If there be *divers* obligations of the like kind, it seemeth to be in the power of the executor to discharge which obligation, and to gratify which of the creditors he will; which being done, the other creditors are without remedy, if there be no assets; unless the day of payment in the one obligation (as was observed before) be expired, and the day of payment of the other obligation is not yet come: in which case, the former obligation is to be first satisfied; or unless there be suit commenced for some obligation, for then it is not in the power of the executor to discharge another obligation for which no action is brought, in prejudice of the former suit. But an executor may confess judgment on one obligation, and plead that judgment to an action brought on another obligation. And if there be two obligations, and the two several creditors bring several actions against the executor, he that first obtaineth judgment must be first satisfied. *Swin.* 457, 458. 2 *Bac. Abr.* 434, 435.

Although the executors are not named in an obligation, yet the law will charge them, for that they represent the estate of the testator. And the law is the same of administrators. But the heir shall not at any time be charged, without express mention of the heir. *Dyer*, 23.

23. Debts by simple contract are postponed to all others, being debts of an inferior nature; yet an executor is bound, as far as he hath assets, to pay them, as much as any other debt; and therefore a simple contract creditor need not allege, that the executor had assets to satisfy debts of a superior nature, and his also; but if the truth be, that the executor hath only assets sufficient to satisfy such superior debts, he must plead it. 2 *Bac. Abr.* 434.

Simple contract.

But by the 29 *C.* 2. *c.* 3. No action shall be brought whereby to charge any executor or administrator upon any special promise to answer damages out of his own estate, unless the agreement upon which such action shall be brought, or some memorandum or note thereof, shall be in writing and signed by the party to be charged therewith, or some other person thereunto by him lawfully authorised. § 4. [355]

But albeit the law requires, that debts should be paid according to their superiority, as herein set forth; yet may an executor pay a debt on a simple contract before a specialty, if he hath no notice of such specialty: for otherwise it might be in the power of the obligee to ruin the executor by keeping his bond in his pocket until the executor shall have paid away all the assets in discharging simple contract debts. 2 *Bac. Abr.* 434, 435.

But of debts upon record, the executor ought to take notice at his peril. 2 *Bac. Abr.* 435.

And in the case of *Greenwood* and *Brudnish, T.* 1720, a man mortgaged his lands, and gave a bond to perform covenants, and after died intestate. His widow, *without* taking letters of administration, possessed herself of his personal estate, and paid it all away in satisfying debts on simple contract. About seven years after, an old dormant entail was discovered, and the heir in tail brought an ejectment, and recovered possession. Whereupon the mortgagee sued the widow upon the bond. She brought a bill for an injunction, having paid away all the testator's assets before any notice of this bond, and therefore alleged that she ought not to be chargeable with a *devastavit.* The defendant demurred, and the demurrer was clearly allowed, the bill being an attempt to alter the course of law. But if any extraordinary fraud had been charged on the defendant, by which she had been deceived, or induced to pay away the assets, that might have varied the case. *Prec. Cha.* 534.

In what case debts shall be paid *pari passu.*

24. A person indebted by bond and simple contract, devised *lands to trustees* to be sold for payment of his debts; it was resolved and declared to be the constant rule, that the creditors should have in proportion, and not the bonds to be first satisfied: for it shall be construed, that (one of them being as much a debt as the other) the testator intended they should all be paid alike; and if the value of the land fall short, they shall be satisfied in proportion: So legatees shall have equal proportion *pro rata,* according to the greatness or smallness of the legacy; for the land is made debtor: But otherwise it is of *judgments;* [356] for these do affect the land by their own strength and nature, and would have had the preference, whether such devise had been made or not. 2 *Freem.* 49. 175.

But if a man only charge his lands with the payment of debts, so that the lands descend subject to them; bonds shall be preferred to simple contract debts. 1 *P. Will.* 430.

A man deviseth his lands to two persons in trust, to be sold for payment of his debts, and maketh the same persons *executors.* The question was, whether bond debts should have a preference, or all debts be paid *pari passu.* The difference was taken, when the same persons that are trustees to sell the lands are executors likewise, and where not; for in the former case, after the land is sold, it is assets even *at law;* and therefore to decree them to pay otherwise than according to the legal course, would be to decree a *devastavit.* And in this case it was decreed, that bond debts must be preferred. *Prec. Cha.* 127.

But in the case of *Lewin* and *Okely,* July 26, 1740; where there was a devise to trustees for the payment of debts, and the

same persons were made executors, it was held by lord *Hardwicke*, that this shall be equitable, and not legal assets, and all the creditors must be paid *pari passu*. There have been cases (he said) in which it was held, that where trustees are made executors, debts shall be paid in a course of administration, but the modern resolutions have been otherwise. 2 *Atk.* 50.

A *lease* for years, or a bond or grant of an *annuity* taken in a trustee's name, being *personal* assets, shall be applied in a course of administration, and not for the payment of all the debts equally. 2 *Vern.* 764.

If a man possessed of a term for years, mortgageth it and dies, leaving debts, some by bond, and some by simple contract, the *equity of redemption* is *equitable assets*, and shall be liable to all the debts equally. 3 *P. Will.* 341. (*p*)

And the distinction seemeth to be this: Where there are *legal* assets, that is, assets which are liable at law without the help of equity, there the executor may apply them according to the course of law, which allows and requires a preference to be made in certain cases, as hath been mentioned; but where there are only *equitable* assets, that is, assets which are not liable without the help of a court of equity, in such case the court will direct the application thereof according to that course which is most equitable and just, namely, to pay every creditor his share [357] in proportion.

So where the assets are *partly legal* and *partly equitable;* although equity cannot take away the legal preference on legal assets, yet where one creditor has been partly paid out of such legal assets, when satisfaction comes to be made out of equitable assets, the court will postpone him till there is an equality, in satisfaction to all the other creditors out of the equitable assets, proportionable to so much as the legal creditor has been satisfied out of the legal assets. *Cha. Ca. Talb.* 220. 2 *Vern.* 435. (*q*)

In what cases interest shall be allowed. (8)

25. As debts upon judgments, recognizances, mortgages, bonds, and other like specialties, shall carry interest; so also interest hath been allowed upon demands due by *covenant*, although it was objected that they were not liquidated, and only found in damages. *Viner, Interest,* C.

(*p*) An equity of redemption of a mortgage in fee is not equitable assets as against judgment creditors who have a right to redeem. *Sharpe* v. *The Earl of Scarborough*, 4 *Ves.* 538. And assets are not marshalled against judgment creditors. *Ibid.*

(*q*) That the court leans to construe assets equitable rather than legal, *vide supra*, 8.

(8) The court may charge executors with interest on balances in their hands, even though not prayed by the bill, as where they arose subsequently. *Turner* v. *Turner*, 1 *Jac. & W. R.* 43.

Where a man prays satisfaction for a *simple contract* debt, merely out of *personal* assets; a court of equity will of course direct the debt to be paid with interest, to be computed from one year after the testator's death. *Barnard.* 229.

But where a *real* estate is charged with the payment of debts, as well as the personal: the lord chancellor *Hardwicke* said he did not know that it was absolutely fixed that simple contract debts should carry interest from that time; and he believed, if the decrees of the court were looked into, it would be found that a great many of them are in this form, that the master should take an account of the value of the estate and of the debts, that he should compute interest upon such of the debts as carry interest, without giving any direction that interest should be computed upon the other debts. *Id.*

Where a man *devises his land for the payment of his debts;* it is said, that this devise makes the land as a security or mortgage for all the testator's debts, as well those by simple contract as otherwise; and the simple contract debts shall carry interest, as the land, which is the fund, yields annual profits: By lord chancellor *Macclesfield,* who said that this was the daily practice. 2 *P. Will.* 26.

But where a real estate is *charged* only with the payment of debts; the lord chancellor *Hardwicke* seemed to think that this
[358] will not make the simple contract debts to carry interest. And he said, that on a general devise of lands for the payment of debts, he should think that simple contract debts ought not to carry interest. *Barnard.* 230.

The arrears of an *annuity* or rent-charge, are never decreed to be paid with interest where the sum is uncertain; but only where it is certain and fixed. *Cas. Talbot,* 2.

In the case of *Litton* and *Litton, T.* 1719; interest of an annuity was decreed by the lord chancellor from the very day it became due. But Mr. *Peere Williams* adds a query as to this, and says, it seems the arrears should carry interest only from the first day of payment next after the arrears of the annuity became due; if payable half-yearly, then from the next half-year day; if quarterly, then from the next quarter day; and so has been the common rule in these cases. 1 *P. Will.* 541. (*r*)

Debt barred by the statute of limitation.

26. *T.* 1700, *Staggers* and *Welby;* at the lord chancellor's house. It was held by *Cowper* lord chancellor, that if one by will subject his lands to the payment of his debts, debts barred by the statute of limitation shall be paid; for they are debts in

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(*r*) Upon a deficiency of assets, a value must be set on an annuity at the time of the death, and the annuitant can claim only in that respect. *Franks* v. *Cooper.* 4 *Ves.* 763.

equity, and the duty remains; the statute hath not extinguished it, though it hath taken away the remedy. 1 *Salk.* 154. 2. *Vern.* 374.

T. 1726, *Blakeway* and the *Earl of Strafford.* In 1707 sir Henry Johnson was indebted to Blakeway in 343*l.* In 1714 he received 50*l.* in part. In 1719 sir Henry died, having made his will and devised his lands to his executors, in trust to pay his debts. The executors renouncing, the earl of Strafford administered [with the will annexed. Blakeway brought his bill to be paid out of] the assets. The earl of Strafford pleaded the statute of limitations; and that neither he, nor (as he believed) sir Henry, made any promise to pay the debt, within six years before the bill brought. Lord chancellor: I would be cautious in giving any relief against an act of parliament; but it is plain the debt is not extinguished by the statute of limitations, since the statute must be pleaded, which the defendant is not bound to do; and if he afterwards will acknowledge the debt, it takes it out of the statute: and his lordship overruled the plea. Upon appeal brought in the house of lords, this decree was reversed, and the plea ordered to stand for an answer. 2 *P. Will.* 373. (*s*)

But if the debtor by his will directs that *all his debts* shall be [359] paid, or makes any provision for the payment of his debts in general; this will revive it, and bring it out of the statute, and make his executors liable. *Prec. Cha.* 385.

So if the debtor, upon application for that particular debt, acknowledges and promises payment (for a bare acknowledgment is not sufficient); this will bring it out of the statute: for the acknowledgment and promise is a new evidence of the debt. *Id.*

But in the case of *Norton* and *Freeker*, *H.* 1737, it was said by the lord chancellor *Hardwicke*, that an executor is not *compellable*, either in law or equity, to take advantage of the statute of limitations, against a demand otherwise well founded. 1 *Atk.* 526.

Executor may file a bill, to determine

27. Where a testator is much indebted, and the executor is desirous to be rid of the assets; the executor's safest way is, to file a bill in chancery against the creditors, to the end they may,

(*s*) But with liberty to except, and saving the benefit of the plea to the defendant, till the hearing of the cause. 3 *Bro. P. C.* 305. And the like order was made in *Jones* v. *Earl of Strafford*, 3 *P. Wms.* 89. But no farther proceedings appear to have been had in either case. See Mr. *Cox's Notes, ubi supra.* The point is, however, considered as settled by lord *Mansfield*, who expresses himself thus in *Trueman* v. *Fenton*, *Cowp.* 548.: "Where a man devises his estates for payment of his debts, a court of equity says, (and a court of law in a case properly before them would say the same,) all debts barred by the statute of limitations shall come in and share the benefit of the devise, because they are due in conscience; therefore, though barred by law, they shall be held to be revived, and charged by the bequest." See also *Lacon* v. *Briggs*, 3 *Atk.* 107.

priority of payment. if they will, contest each other's debts, and dispute who ought to be preferred in payment. [*Buckle* v. *Atlee*,] 2 *Vern*. 37.

Plea of *plene administravit*. 28. In debt against an executor, if the defendant plead fully administered, if any assets be found in his hands, although there be not to the value of the debt; yet the plaintiff shall have judgment for his whole debt of the goods of the testator. 1 *Roll's Abr*. 929. (*t*)

[360] But if it be found, that he had nothing in his hands, the judgment shall be, that the plaintiff shall take nothing by the writ, and shall not have judgment of the debt: for he hath waived this advantage by taking of the issue, and judgment is to be given upon the verdict. 1 *Roll's Abr*. 929. (*u*)

(*t*) The judgment in such case used to be against the executor for the whole debt and damages, to be levied *de bonis testatoris, et si non*, &c.; the damages *de bonis propriis*. *Lil. Entr*. 504. But in *Harrison* v. *Beecles*, 3 *T. Rep*. 688., lord *Mansfield*, with the assent of the other judges, would not suffer the plaintiff to recover of the executor more than the assets in his hands with judgment *quando acciderint* for the residue. But if to an action on a bond the executor plead *payment* and *non est factum*, but omit to plead *plene administravit*, and a verdict and judgment be had against him, this amounts to a confession of assets: and to an action of debt upon that judgment suggesting a *devastavit*, he cannot plead that he has fully administered, but will be liable for both debt and damages *de bonis propriis*. See *Erving* v. *Peters*, 3 *T. Rep*. 685; and *Rock* v. *Leighton*, *ib*. 690. So if a person bind himself *as administrator*, to abide by an award to be made, touching matters in dispute between his intestate and another, and the arbitrators award that he *as administrator* should pay, he cannot plead *plene administravit* to debt on the bond; for by submitting to such an award, he has admitted assets. *Barry* v. *Rush*, 1 *T. Rep*. 691. But a mere general *submission* to an award by an administrator is not of itself an admission of assets. *Pearson* v. *Henry*, 5 *T. Rep*. 6. *Vid. supra*, 8. *Worthington* v. *Barlow*, 7 *T. Rep*. 453.; in which case lord *Kenyon* held, that if an arbitrator *award* a payment by an administrator, it is equivalent to determining that he has assets. If an executor plead that he has fully administered, and the plaintiff does not take issue on that plea, but takes judgment of assets *quando acciderint*, on a *scire facias* on that judgment he can only have execution of such assets as shall have come to the executor's hands since the judgment. But if it appear to the court on affidavit, that assets have come to the executor's hands, between the purchasing of the original writ and the judgment, the court will permit the plaintiff to enter up his judgment in such a manner as to reach them, except the executor can shew that some injustice will thereby be done him, as in case he should have fairly paid other debts in the interval. *Mara* v. *Quin*, 6 *T. Rep*. 1. In chancery, if a plaintiff pray an account, or procure a receiver to be appointed, this is a waiver of an admission of assets. *Wall* v. *Bushby*, 1 *Bro. C. C*. 484.

(*u*) For here the plaintiff might have had judgment for the debt of the goods of the testator, which might hereafter come to be administered. *Lil. Ent*. 505.

29. If an executor plead *ne unque executor*, and is found executor; the judgment shall be general, to recover the debt, for his false plea. 1 *Roll's Abr.* 930. **Plea of *ne unque* executor.**

In an action of debt against an executor, who pleadeth that he is not executor, nor even administered as executor, and this is found against him; the judgment shall be of the goods of the testator, if there are any such; if not, of his own goods; as well [361] for the debt, as for the damages and costs. 1 *Roll's Abr.* 930. 1 *Atk.* 293. (*v*)

30. An executor shall not be forced to pay legacies, until the legatees shall give bond to refund in proportion, or in the whole, for the satisfaction of debts, if any shall appear unsatisfied. *Cha. Ca. Finch.* 136, *Viner*, Devise, Q. d. 7. **Debts to be paid before legacies.**

For debts are to be paid before legacies: and if the spiritual court will compel an executor to pay a legacy before he pay the testator's debts; a prohibition will lie. *Law of Ex.* 182.

But where lands are devised for payment of debts and legacies, and the debts are such as land is not liable to satisfy, as debts by simple contract; there, it is said, the debts shall have no preference of the legacies: but if there be not sufficient to pay all, they shall be paid in proportion. 2 *Freem.* 270.

So if a man bind himself in an obligation to perform a certain thing, and deviseth divers legacies, and dieth, leaving only sufficient to satisfy the obligation, if this shall come to be forfeited; yet this obligation shall not be any bar of the legacies, because it is uncertain whether the obligation will ever come to be forfeited: but the executor shall make a conditional delivery of the legacy, to wit, that if the obligation shall be recovered against him, the legatee shall re-deliver the legacy. 1 *Roll's Abr.* 928.

[When executors pay a sum of money on their testator's account, which was not due, in an action to recover it back, they must declare in their own right, and not as executors; but if the money was due in conscience, such an action will not lie. (8 *a*)]

(*v*) What constitutes an executor of his own wrong See *supra*, *Probate*, 9.

(8 *a*) *Munt* v. *Stokes*, 4 *T. Rep.* 565.

VII. *Of the payment of legacies, and distribution of intestate's effects.*

And,

I. *Concerning the payment of legacies.*

II. *Concerning the distribution of intestate's effects,* [page 392.]

[III. *Concerning the stamp duties chargeable on legacies and the distributive shares of an intestate's estate,* (page 479.)]

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I. *Concerning the payment of legacies.*

What persons are incapable of a legacy.

1. BY the statutes of the 25 *C.* 2. *c.* 2. and the 1 *G. st.* 2. *c.* 13. persons required to take the oaths, and otherwise qualify themselves for offices, who shall act without such qualification, shall be incapable of any legacy.

By the 9 & 10 *W. c.* 32. Persons asserting that there are more gods than one, or denying the christian religion to be true, or the holy scriptures to be of divine authority, shall, for the second offence, be incapable of any legacy. [The same penalty was inflicted by this act for denying the Trinity: but was repealed by 53 *G.* 3. *c.* 160.]

And by 5 *G. c.* 27. Artificers going out of the kingdom, and exercising their trades in foreign parts, shall be incapable of any legacy.

In what cases legacies are taken away or extinguished. [See 2 *Bridgm. Dig.* tit. *Legacy,* &c. XI.]

2. A legacy is extinct, by taking a bond for it. *Yelv.* 39. (9)

Where the *statute of limitation* was pleaded in bar to a legacy demanded, due twenty years before; it was held by the lord chancellor, that a legacy is not barred by the statute, nor ever had been so held. 2 *Freem.* 22.

The father by his will gave to his daughter 1000*l.* to be first paid after his debts, besides a share out of the dividend of his estate. Afterwards, on her marriage, an *agreement* was made, for what she should have out of her father's estate, and that it should be only 1100*l.*, and that was to be in full of what was intended her thereout. It was decreed by the master of the rolls, and confirmed by the lord chancellor, that this was an ademption of the legacy, and that the 1100*l.* was to be in full of what the daughter was to have out of the said estate. *Hale* and *Acton,* 21 *C.* 2. 2 *Cha. Ca.* 35. (*w*)

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(9) See *Orme* v. *Smith,* 2 *Vern.* 681.

(*w*) As an agreement may be a satisfaction of a legacy, so a legacy may be a satisfaction of an agreement; as where a man had one daughter, to whom 8,000*l.* was secured by marriage settlement, and afterwards he gave her 8,000*l.* by his will for her portion, and 200*l.* *per ann.* Lord keeper *Harcourt* held, that the daughter shall have but one 8,000*l.*, though she may elect which of the portions she pleases. *Copley* v. *Copley,* 1 *P. Wms.* 147. So also, the bequest of

A man by his will gave his four daughters 600*l.* apiece, and afterwards married his eldest daughter to the plaintiff, and gave her 700*l.* portion. After that, he makes a codicil, and gives 100*l.* apiece to his unmarried daughters, and thereby *ratifies and confirms his will*; and dies.

The plaintiff preferred his bill for the legacy of 600*l.* given to his wife by the said will. It was held by the master of the rolls, that the portion given by the testator in his lifetime should be intended in satisfaction of the legacy. And it was agreed to be the constant rule, that where a legacy is given to a child, who afterwards, upon marriage or otherwise, receives the like (1), or a greater sum, it shall be intended in satisfaction of the legacy, unless the testator declares his intention to be otherwise. And it was said, the words of *ratifying and confirming* do not alter the case, though they amount to a new publication, being only words of form, and declare nothing of the testator's intent in this matter. 2 *Freem.* 224. *Irod* v. *Hurst*, *T.* 1698. [S. P. by lord *Hardwicke* in *Farnham* v. *Philips*, 2 *Atk.* 214. (*x*)

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the residue of testator's personal estate to a younger son, being greater than the provision by the father's marriage settlement, was decreed a satisfaction of that portion. *Rickman* v. *Morgan*, 1 *Bro. C. C.* 63. and 2 *Bro. C. C.* 394. And a legacy has been decreed to go in part satisfaction of a provision by settlement. *Warren* v. *Warren*, 1 *Bro. C. C.* 305. But this is question of *intention*. See *Hanbury* v. *Hanbury*, with the cases there cited, 2 *Bro. C. C.* 352 & 529., and lord *Thurlow*'s judgment in *Rickman* v. *Morgan*, Ib. 394. *Jeacock* v. *Falkener*, 1 *Bro. C. C.* 295. *Barret* v. *Beckford*, 1 *Vesey*, 519.

[But portions for children by the will of a parent are presumed to be a satisfaction of a prior provision by settlement, unless clearly not so intended, and the presumption is not rebutted by slight circumstances. *Hinchcliffe* v. *Hinchcliffe*, 3 *Ves.* 516.]

(1) *Cookson* v. *Ellison*, 2 *Cox*, 220. 3 *Bro. C. C.* 61.

(*x*) But this rule does not apply to portions given by a stranger or distant relation, not *in loco parentis*, which shall not adeem a legacy given by his will. And the reason of the distinction is, that a parent is under a debt of nature to portion his child, and though he gives a legacy generally, he must be understood to mean it as a portion. If therefore he gives a sum of money afterwards upon marriage, it is for the same end, and consequently an ademption of the legacy.

But a stranger not being under this obligation shall be taken to have meant a double bounty, unless the contrary appear by evidence. *Shudal* v. *Jekyll*, 2 *Atk.* 516. *Powell* v. *Cleaver*, 2 *Bro. C. C.* 500. In *Hartop* v. *Whitmore*, 1 *P. Wms.* 681., the portion given by a father was less than the legacy, yet the latter was held to be adeemed.

[Legacy to creditor, how far a satisfaction of a debt. See *supra*,

[The strict rule is established, that a legacy given by a debtor to his creditor, which is *equal* to or *greater* than the debt, shall be presumed to be intended in satisfaction of the debt. *Talbot* v. *D. of Shrewsbury*, *Pre. Ch.* 394. *Jeffs* v. *Wood*, 2 *P. Wms.* 132. *Fowler* v. *Fowler*, 3 *P. Wms.* 353. *Reech* v. *Kennigal*, 1 *Ves.* 126.; though if *smaller*,

A man seised in fee, devised to his children 1000*l.*, payable at several times, by 50*l.* a year, with which sums he charged his

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Of what things, 9.

it shall not be taken as a satisfaction *pro tanto*. *Cranmer*'s case, *Salk.* 508. This was a case of a legacy *greater* than the debt; and lord chancellor *Harcourt* said, the *intention* of the party ought to be the rule in all these cases. And in *Cuthbert* v. *Peacock*, 1 *Salk.* 155, a legacy *greater* than the debt was not taken to cancel it. Nor is a legacy presumed to be in satisfaction, if the payment of debts is particularly mentioned in the will, or if it appears from it that the testator meant to be both just and generous, for the rule is taken strictly. *Richardson* v. *Greese*, 3 *Atk.* 65. *Chancey*'s case, 1 *P. Wms.* 408. 410. *n.* where the cases are collected, 10 *Mod.* 399. S. C. And courts always endeavour, if there is any room for it, to distinguish cases out of it. *Clarke* v. *Sewell*, 3 *Atk.* 96. 3 *Ves.* 466. *Barclay* v. *Wainwright*, S. P. Thus where the legacy is not equally beneficial with the debt in some one particular, as in time of payment, though it may be more so in another, it is out of the general rule (see *Nicholls* v. *Judson*, 2 *Atk.* 300. *Pre. Ch.* 270. *Matthews* v. *Matthews*, 2 *Ves.* 635. *Haynes* v. *Micoe*, 1 *Bro. C. C.* 129.), except in the case of a child legatee. 3 *Ves.* 466. So if it is less beneficial in point of certainty. *Crompton* v. *Sale*, 2 *P. W.* 555. *Barret* v. *Beckford*, 1 *Ves.* 519. Or if the debt was subsequent to the bequest. *Salk.* 508. *Thomas* v. *Bennet*, 1 *P. Wms.* 343. *Fowler* v. *Fowler*, 3 *P. W.* 355. Nor does the rule apply, if the thing given is of a different nature. Thus land shall not go in satisfaction of money; or if the legacy is on condition; for by the breach he may be a loser; whereas the will intended it for his benefit. *Salk.* 508.

Two legacies to same legatee in the same or different instruments.

Where two legacies of the same sum are bequeathed to the same person, speaking *simpliciter*, by *different instruments*, *viz.* one by will, and the other by codicil, the legatee is entitled to both (*James* v. *Semmens*, 2 *H. Bla.* 213.); and it is indifferent, whether the second be of the same or larger amount than the first. But if they are not given *simpliciter*, but the motive of the gift is expressed in each instrument, and the same sum is given, the court considers these coincidences as raising a presumption that the testator meant not a second gift, but only a repetition of the former; but in no other case. (*Hurst* v. *Beach*, 5 *Madd. R.* 358. *James* v. *Semmens*, S. P. *Hooley* v. *Hatton*, 1 *Bro. C. C.* 390. *n.* *Coote* v. *Boyd*, 3 *Bro. C. C.* 521. *acc.* 3 *Ves.* 464. *contra*): though this rule may be repelled by internal evidence of an intended substitution (*Allen* v. *Callow*, 3 *Ves.* 289. *Barclay* v. *Wainwright*, *id.* 462.); or by an exact similarity without circumstances of difference, as in the time of payment of annuities half-yearly and quarterly. *Currie* v. *Pye*, 17 *Ves.* 462. But where two legacies of equal quantity are given *simpliciter* to the same person by the same instrument, and the same cause, or no additional reason is assigned for the repetition of the gift, the presumption is against their being intended as accumulative. *Duke of St. Albans* v. *Beauclerk*, 2 *Atk.* 640. *Garth* v. *Meyrick*, 1 *Bro. C. C.* 30. *Holford* v. *Wood*, 4 *Ves.* 76. So in the common case where the same thing is given twice to the same person, the second cannot operate, because it cannot be given more than

lands, and then died. One payment of 50*l.* became due; then the lands were aliened by *fine* and proclamations, and five years passed. The devisee sued for the whole. But it was decreed, that what became due after the fine, was barred by the fine; but not the 50*l.* due before: for a trust is barred by fine. *H.* 30 & 31 *C.* 2. *Wakelin* and *Warner*, 2 *Cha. Ca.* 247.

Legacy given out of a *term for years;* if the term determines, the legacy is extinct. *Cha. Ca. Finch*, 464.

A legacy of a *lease of tithes* is extinguished by a renewal of the lease: but a republication of the will after the renewal restores the legacy. 2 *Vezey*, 418. (*y*)

A legacy was devised out of *debts* due in several counties, and they were all called in before the testator's death; yet the legacy remained good. And a difference was taken between a pecuniary and a specific legacy: for in the first case the legacy will remain, though the debt upon which it is charged be paid in; but the specific legacy may be lost by being altered. So where the legacy was greater than the debt out of which it was directed to be paid did amount unto; yet such sum being expressly devised, and there being assets, it was decreed to be paid. *Cha. Ca. Finch*, 152. *Raym.* 335.

T. 1728, *Ford* and *Fleming*. One by will devised thus: I give to my grand-daughter Mary Ford (the plaintiff) the sum of 40*l.*, being part of a debt due and owing to me for rent from G. M., she allowing what charges shall be expended in getting the same; also, I give unto my two grandsons the rest and residue of what is owing to me from the said G. M., which is about 40*l.* more, to be equally divided between them, they allowing charges as aforesaid. Afterwards, the testator received the whole debt owing for rent from G. M. For the plaintiff it was insisted, that there was a difference between a specific and a pecuniary legacy, that though the disposing of a specific might be an

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once. *Ibid.* But where the same quantity is given with an additional cause assigned for it, or with any implication to shew testator's intention that it should accumulate, the court has so decided it, as where an additional cause or mark of favour was mentioned in the codicil. *Garth* v. *Meyrick*, 1 *Bro. C. C.* 30. *Foy* v. *Foy*, 1 *Cox*, 163. 1 *Bro. C. C.* 392. *n.* *Ridges* v. *Morrison*, *id.* 389. So where a greater legacy was given after a less to the same legatee. *Curry* v. *Pile*, 2 *Bro. C. C.* 225. Or where the same sum was given by will to *A.*, and by codicil to the same person on a contingency, it was held accumulative. *Hodges* v. *Peacock*, 4 *Ves.* 735.] And when a distributary share shall be taken to be a *performance* of the intestate's *covenant*, as to provide for a wife, children, &c. *vide Lee* v. *d'Aranda*, 1 *Vesey*, 1. *Blandy* v. *Widmore*, 2 *Vern.* 709. 1 *P. Wms.* 324. 2 *P. Wms.* 614. 10 *Ves.* 9.

(*y*) *Vide supra, Of what things*, 18.

ademption of it, yet this being a pecuniary legacy, the paying the money to the testator would be a loss of it. On the other side it was insisted, that there is a difference between a voluntary and a compulsory payment; that though the first was no ademption, yet the second was; and that the testator compelled G. M. to pay in the money. But the lord chancellor was of opinion, that there was no foundation for the difference taken in the
[365] books between a voluntary and compulsory payment; for the latter might be, with an intent to secure the legacy at all events; and decreed to the plaintiff the 40*l.* legacy. 1 *Abr. Cas. Eq.* 302.

So in the case of *Ashton* and *Ashton*, *M.* 1735, where the testator deviseth a debt, and afterwards receives it, or otherwise calls it in: in neither of these cases is this an ademption of the legacy; seeing this might be done from an apprehension of such debt being in danger, and with a design to secure it; and being personal estate, and not diminished by remaining in the testator's coffer instead of the hands of the debtor, it may well pass by the will. 3 *P. Will.* 386. (*z*)

M. 1736, *Partridge* and *Partridge*. The testator devised to the legatee 1000*l.* capital South Sea stock. At the time of making his will he had 1800*l.* of such stock; and after by sale reduced it to 200*l.*; which he after increased to 1600*l.*, and died. Between the making his will and his death, the act took place, which changed three fourths of the capital South Sea stock into annuities. This legacy is not taken away or impaired, by the sale, or by the act of parliament. *Cas. Talb.* 226. (*a*)

Legacy where to be sued for.

3. The legatary or devisee may not of his own head take the goods or chattels devised to him out of the possession of the executor, because the law gives him a remedy for the same, and
[366] because the law doth not appoint that the legacies shall be paid until the debts of the testator be first satisfied. *Swin.* 19. 2 *Bac. Abr.* 435.

For if the executor do detain the legacy, or do slack the performance of the testator's will, the legatary must sue the executor in the ecclesiastical court, for the same legacy so detained or not satisfied. *Swin.* 18.

(*z*) S. P. *Atto. Gen.* v. *Parkin*, *Amb.* 596. *Bronsdon* v. *Winter*, *ib.* 57. *Vid. tamen Badrick* v. *Stevens*, 3 *Bro. C. C.* 431. [*Stanley* v. *Potter*, *T.* 1789, 2 *Cox*, 180. *Ashburne* v. *M'Guire*, 2 *Bro. C.C.* 108.]

(*a*) S.P. *Bronsdon* v. *Winter*, *Amb.* 57. Where the testator bequeathed 2000*l.* capital stock in the South Sea company; at the time of making his will, he had just 2000*l.* in that stock, but afterwards sold it; and *Verney* M. R. held, that this was not a specific legacy, nor adeemed, but decreed the executor to make good the 2000*l.* stock, out of the testator's personal estate.

For where a devise is made of goods, if the executor will not deliver them to the devisee, he hath no remedy by the common law. *Terms of the L.* Devise.

For an action on the case lieth not against an executor for a legacy; unless he promise to pay it upon good consideration: for legacies are only to be recovered in the spiritual court, or in the courts of equity. 1 *Sid.* 46. *Vin.* Actions, O. *c.* 7. (*aa*)

(*aa*) The jurisdiction of the court of chancery in suits for legacies is but of modern date compared with that of the ecclesiastical courts, being said to have commenced in the time of lord C. Nottingham; [for suits for legacies charged on personal estates were originally and properly cognizable in the ecclesiastical courts, as a branch of that testamentary jurisdiction which undoubtedly belongs to them; but legatees instituting suits there, finding the authority of that court inadequate to enforce a full discovery of assets, were frequently driven into equity for that purpose; and, therefore, to save a circuity of suit, and in ease of the suitor, courts of equity exercised complete jurisdiction in the matter, by enforcing the discovery and account, and decreeing payment of the legacy. But in the exercise of this concurrent jurisdiction, courts of equity necessarily adopted the law of that forum in which the suit was originally cognizable; and therefore it is, that where a suit is instituted in equity for payment of a legacy charged upon the personal estate, if a question arise upon the right of the legatee to demand payment, it is governed by the civil law; whereas if the legacy is charged on a real estate, the rules of the common law prevail, because in the latter case the jurisdiction of the temporal court is original and exclusive. *Keily* v. *Monck*, 3 *Ridgw. P. C.* 213.]

The court of chancery considers the executor as a trustee for the legatee, and will compel him (if he appears to have wasted the estate or to be in insolvent circumstances) to give security for the legacy if payable at a future day, or to bring the money into court. 1 *Cha. Ca.* 121. 3 *Bro.C.C.*365. [So a bill may be filed in exchequer for a legacy. *Duncumbent* v. *Stint*, 1 *Ch. C.* 121. *Infra*, 4.] And as it is a rule that he who seeks must do equity; if a husband and wife sue for the personal legacy left to the wife, the court will not compel the payment of it till a proper settlement be made on her. *Brown* v. *Elton*, 3 *P. Wms.* 202. The court will also see money put out for children; which excellent provisions could be but imperfectly obtained in the ecclesiastical court, and with still greater difficulty in an action for a legacy at common law, in which the legatee, if he recovered at all, must recover without any terms. These reasons induced the court of K. B. in a late case, to decide that an action for a legacy does not lie at common law. *Deeks et ux.* v. *Strutt*, 5 *T. Rep.* 690. But such action will lie if the executor, having assets in his hand, assent to the legacy; for the moral obligation which he is under to pay the legacy, provided he has assets, is a sufficient consideration for his undertaking to pay it. *Atkyns et ux.* v. *Hill*, and *Hawkes et ux.* v. *Saunders*, *Cowp.* 284—294. *Pearson* v. *Henry*, 5 *T. Rep.* 6. Such promise must, however, be in writing by 29 *C.*2.

And in case of suit in the spiritual court, it behoveth the devisee to have a citation against the executor of the testament to appear before the ordinary, to shew why he performs not the will of the testator. *Terms of the L.* Devise.

And although certain goods in specie are given to a man by will, yet he cannot take them without the executor's assent; so if a term for years be so given to him, he cannot enter into the land without such assent: for it may be the executor hath not assets besides to pay the testator's debts. *Law of Ex.* 262.

Yea if a man do bequeath goods to another, which are in the custody of that other person, yet if he detain them from the executor (who hath not assented to the legacy), the executor may have an action of detinue or trespass, or of trover after demand of the goods, against the said legatee. *Law of Ex.* 263.

But in case of a devise of *lands*, the devisee may enter without the assent of the executor; and if the heir at law should enter before him, the devisee may enter and eject him. 1 *Inst.* 11.

For seeing that an inheritance devised is not demandable in the ecclesiastical court, but in the temporal; therefore the legatary, according to the devise, without farther assignment or delivery, may enter into the same after the death of the testator. *Swin.* 19.

But if *chattels real*, as a lease, be bequeathed by will; a man may sue for the same in the court ecclesiastical. *Swin.* 19.

If a legacy be granted *out of lands* in fee simple, this shall not be sued for in the spiritual court; but if land be devised to be *sold for payment of legacies*, the land being sold, the suit for the money to be distributed may be in the spiritual court; for the money is personal, and assets in the hands of the executors, so as it savours not of the realty being executed. *Cro. Car.* 396, 397. *Brownl.* 32.

But where a man deviseth that his executors shall sell his lands, and, out of the money which shall be raised by sale, giveth a *portion to his daughters*, it hath been adjudged, that neither the land nor money is testamentary, for it is not assets to satisfy debts, but a sum arising of land, and appointed to special

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c. 3. § 4. But in *Cambden* v. *Turner*, C. B. sittings after *Trin.* 5 *G.* 1. *King* C. J. held, that an action for money had and received lay against an executor, for a legacy which he had owned *lay ready for the plaintiff whenever he would call for it;* cited by *Buller* J. in *Hawkes* v. *Saunders, ubi supra.* And in *Williams* v. *Lee*, 3 *Atk.* 223., the court of chancery held, that after an executor has assented, a legatee of a specific legacy may recover it in an action of trover. [And the court of K. B. decided, that an action at law lies against an executor to recover a specific chattel bequeathed, after his assent to the bequest. *Doe* d. *Saye and Sele* v. *Guy*, 3 *East's Rep.* 120. A legatee is entitled to have his expences paid when he establishes a paper. *Sutton* v. *Drax*, 2 *Phill. Rep.* 323.]

uses in way of equity, and not as a legacy, and therefore not to be sued for in the ecclesiastical court, but in a court of equity: and the ecclesiastical court cannot hold plea of a legacy in equity, but where it is a legacy in law indeed. *Cro. Car.* 395, 396. *Swin.* a. 19.

So if a man devise lands to be sold for the payment of debts, and dispose of the *surplus* to several persons, that cannot be sued for in an ecclesiastical court, but only in a court of equity; because that is not a legacy merely of goods and chattels, but it ariseth originally out of lands and tenements; and they have a testamentary jurisdiction touching chattels only. *Str.* 672.

So where the testator devised a legacy to one, to be paid out of the *profits* of his lands, and he deviseth those very lands to his executor for a term of years, and died; adjudged, that this was a temporal matter, and not testamentary, because the legacy was to arise out of the profits of the lands. *Swin.* 20.

But where the testator devised *leases* to his eldest son, and that out of the same he should raise such a sum of money for portions for his daughters, who libelled in the spiritual court for their portions; it was adjudged, that this should not be accounted as a rent issuing out of the lands, but as a testamentary legacy, and to be recovered in that court. 2 *Bulst.* 153.

M. 2 *Ann. Ewer* and *Jones.* It was held by *Holt* chief justice clearly, that a devisee may maintain an action at *common law*, against a tertenant for a legacy devised out of land; for where a statute, as the statute of wills, gives a right, the party by consequence shall have an action at law to recover that right. 2 *Salk.* 415.

But the usual remedy in such like cases is in equity. 3 *Salk.* 223.

It is said, that where the ecclesiastical court and a court of equity have a concurrent jurisdiction, whichever is first possessed of the cause has a right to proceed: and the same of all other courts. But where the husband hath sued in the spiritual court for a legacy given to the wife, the court of chancery hath granted an injunction to stay proceedings; because the spiritual court cannot oblige him to make an adequate settlement on her. *Prec. Cha.* 546.

So where a personal legacy was given to an infant; it was held, that the same is more properly cognizable in chancery than [369] in the ecclesiastical court; and if the matter had proceeded to sentence in the ecclesiastical court, yet it was proper to come into chancery for the executor's indemnity; for in the chancery legatees are to give security for the money, but not in the spiritual court; and the chancery will see the money put out for the children. 1 *Vern.* 26.

So where there is a trust, or any thing in nature of a trust,

notwithstanding the ecclesiastical court hath an original jurisdiction in legacies, yet the chancery will grant an injunction to stay the proceedings in the ecclesiastical court; trusts being properly cognizable only in equity. 1 *Atk.* 491.

So where a will is suppressed or destroyed, the suit for a personal legacy may be in equity in the first instance, without resorting to the spiritual court; otherwise it would put the plaintiff upon great difficulties; for in the spiritual court, the plaintiff must prove it a will in writing, and must likewise prove the contents in the very words, and must also prove the whole will, though the remainder of it doth not at all belong to, or regard his legacy; which the temporal courts do not put a person upon doing. Much more, when the legacy is charged both out of personal and real estate; for as to the real estate, there is no occasion to resort to the ecclesiastical court at all. 3 *Atk.* 361.

Legacies may be recovered in the spiritual court against an *administrator with the will annexed*, or against an *executor of his own wrong*. 1 *Roll's Abr.* 919.

Where the executor, being sued in the spiritual court for a legacy, pleads the legatee's release, and that court tries the validity of that release, the common law will not prohibit them, provided they try it by the rules of the common law; because they have jurisdiction of the legacy, which is the original cause. 2 *Roll's Abr.* 307.

But where *plene administravit* was pleaded in the spiritual court, and proved by one witness, which they would not allow; a prohibition was granted. *Het.* 87.

So where an executor, being sued for a legacy in the spiritual court, pleaded the plaintiff's release, which was disallowed there, because the witnesses were dead, and that court refused to allow circumstantial proofs of the release; a prohibition was granted. 2 *Roll's Abr.* 302.

Security to be given, when the day of payment is distant.

4. An executor may in some cases be compelled to give security to pay a legacy; as where 1000*l.* was devised to a person to be paid at the age of twenty-one years; and upon a bill exhibited against the executor, suggesting a *devastavit*, and praying that he might give security to pay the legacy when due, it was decreed accordingly. 1 *Cha. Ca.* 121.

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The testator devised 800*l.* to an infant, to be paid by his executor when the said infant should attain to the age of twenty-one years. The infant by his guardian exhibited a bill, that the executor might give security for the payment of the money. And so it was decreed. *Swin.* a. 40. *Law of Ex.* 187.

The testator bequeathed his personal estate to his wife for life, and what she should leave at her death to be equally distributed between his own kindred and hers; if the estate be so small, that she cannot live upon it without spending the stock. it seems she

shall not be obliged to give security; otherwise she shall. *Prec. Cha.* 71.

H. 11 *Ja. Prowe's* case. If a person possessed of a lease for years, devise that his executor out of the profits thereof shall pay to every one of his daughters 20*l.* at their full age; the executor may be sued in the spiritual court, to put in surety to pay the legacies, and no prohibition shall be granted; for this is to issue out of a chattel. 2 *Roll's Abr.* 285.

But in the case of *Palmer* and *Mason, M.* 1737. Where 500*l.* was given to the grand daughter, to be paid at twenty-one or marriage; and if she died before either of those contingencies happened, then to go over to another: It was said by lord *Hardwicke*, as the legacy was devised over, nothing vested in the grand-daughter till one of the contingencies should happen; and therefore she was not entitled to have the legacy secured. 1 *Atk.* 505. (*b*)

5. Mr. *Wentworth* says, In case an infant be of the age of discretion, to wit, fourteen years, he holdeth it clear, that the payment of a legacy to him made will stand good, whether he who makes such payment have any acquittance or not; for if he have proof of the payment, he is well enough acquitted from any second payment. *Went.* 219.

Payment to an infant.

[371]

And he thinks on demand and acquittance tendered, he ought to pay it to an infant of tender years (in presence of his guardian); payment according to the testator's appointment being the matter which acquitteth the payer. *Went.* 220, 221.

And Mr. *Clerke* says, If a legacy be left to an infant under seven years of age, the father (or next of kin) shall apply to the judge before whom he intends to sue for the legacy, and allege that such a person deceased made his will, and appointed such a one executor, and in the said will bequeathed unto his son, being an infant (under seven years of age) such a legacy; and that by reason of such age, the said infant hath not a person able and fit to sue for the same; and shall implore the office of the judge in that behalf, and request that curators be assigned to the infant,

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(*b*) But, *per* lord *Thurlow* C., in *Green* v. *Pigott*, 1 *Bro. C.C.* 103., the latter cases have been, that the fund should be appropriated; and whether a legacy be payable at a fixed or a contingent future day, the effect is the same: and his lordship approved of the decree of the master of the rolls, ordering the legacy to be laid out in the purchase of bank 3 *per cent.* consolidated annuities, in the name of the accountant general, upon the trusts, and subject to the contingencies of the testator's will. See also *Billings* v. *Sandom*, 1 *Bro. C.C.* 393. *Nowlan* v. *Nelligen*, *ib.* 489. *et supra, Form and Manner*, 35. *n.*; and this is the more necessary, as in case of the executor's bankruptcy, his certificate is a bar, and the residuary legatees are not liable. *Walcot* v. *Hale*, 2 *Bro. C.C.* 305.

to sue for and recover the said legacy from the executor: Whereupon the judge usually assigneth such father or next of kin to be curators in that behalf. 1 *Ought.* 357.

But if the minor is above seven years of age, the judge doth not, *ex officio*, constitute a curator; but the minor is to choose one, either personally, or by commission (as in case where he lives at a great distance, or otherwise), or sometimes by special proxy under his hand and seal, requesting that such curator may be assigned by the judge as aforesaid. *Id.* 358, 359, 360.

And if the executor, on suit of the minor by such curator as aforesaid, pay to the curator the legacy due to the minor, he is discharged from any further payment thereof to the minor when he comes of age; although the curator never pay it to the minor, or shall become insolvent: and the reason is, because he pays it by the decree of the judge. And therefore it is advisable for the executor, not to pay the legacy until suit hath been commenced against him by the curator, and he the said executor hath been cited: and then let him offer to pay the legacy *judicially*, that is, according to the forms of the court: and the same being entered in the acts of the judge, the executor is discharged. *Id.* 362, 363.

And in this case the judge is not wont, nor is obliged, to
[372] deliver the legacy to the curator for the use of the minor, until he hath given caution for the indemnity of the judge and of the executor in this behalf, and for the payment thereof to the minor when he shall come of age. *Id.* 363.

And in the court of chancery, in the case of *Bullen* and *Allen*, *T.* 28 *C.* 2. An infant exhibited a bill by his guardian, for a legacy of 100*l.* devised to him. The defendant by his answer confessed the legacy, and that he was always ready to pay it, so as he might be lawfully discharged, which the plaintiff by reason of his infancy could not do: and therefore insisted that it might be paid without interest. Which was decreed accordingly, and the defendant to be indemnified. *Cha. Ca. Finch.* 264.

And in the case of *Dyke* and *Dyke*, *H.* 25 *Cha.* 2. Where legacies were devised to infants payable at a certain time, which expired during their infancy, and the executor refused to pay the same, because the legatees could not give any discharges by reason of their infancy; it was decreed, that the master should put out the money at interest in the name of the guardian, or of such other person as he should think fit, and that the defendant should be indemnified against the infants. *Cha. Ca. Finch.* 95.

In the case of *Holloway* and *Collins*, *H.* 26 & 27 *C.* 2. A legacy of 125*l.* was given to the plaintiff, being but ten years old, and at that age was paid to the plaintiff's *father*, who died insolvent. This was held by the lord keeper to be good payment: but the attorney-general urged very much the ill consequence of

this; for the law must be the same if it were 1000*l.* and extends to other cases of like nature, not to legacies only; and said, that the executor ought to have sued in this court to have paid it. And the lord keeper said, it may be so where the legacy will bear the charge of suit, but not otherwise. But the executor having taken a bond to save him harmless, it was decreed that he should pay it over again, for he had paid it at his own peril. 1 *Cha. Ca.* 245.

But in the case of *Strickland* and *Hudson*, *E.* 7 *An.* lord chancellor *Cowper* said, that the master of the rolls, who had longer experience than himself, would never allow a child's legacy to be paid to the father or mother upon any security whatever, by reason of the strife it might occasion in a family. 3 *Cha. Ca.* 168.

And in the case of *Doyley* and *Tolferry*, *M.* 1715; a legacy of 100*l.* was devised to an infant of about ten years of age; the executor paid this legacy to the father, and took his receipt for it. [373] When the infant came of age, his father told him he had received the legacy, but could not pay it him immediately, and said he would not have him trouble the executor, for he would give it him. The son rested satisfied with this for about fourteen or fifteen years; and his father and he having carried on a joint trade together, became bankrupts. This legacy of 100*l.* being amongst other things assigned by the commissioners for the benefit of the creditors, the assignee brought a bill against the executor for an account and payment of this legacy. The defendant insisted on the extreme hardship of his case, if he should be obliged to pay the legacy over again; that he had justly paid it to the father, whilst he was in good circumstances; and that if application had been made sooner, he might have had his remedy over against the father; that the father was by nature guardian to his child; and that formerly payment to him was allowed to be good. The lord chancellor said, that if the father had not made the son such promise of recompence, and the son had acquiesced all that time, the case might have been more doubtful; but this promise of the father drew him to forbear applying to the executor sooner; and since the father had not and could not now make good his promise, being a bankrupt, the reason of the son's forbearance was at an end; he thought the rule of this court in not suffering parents to receive their children's legacies was founded on very good reason; and therefore lest hereafter this case should be cited as a precedent, when the circumstances attending it might be forgot, and to discountenance and deter others from paying such legacies to the parents (though he did not deny the hardship of that particular case) he decreed for the plaintiff against the executor. 1 *Abr. Cas. Eq.* 300. 3 *Bac. Abr.* 484.

November 11, 1740; *Phillips* and *Paget*. Mrs. Paget, by her

will, gives a legacy of 100*l.* to each of the three children of Mr. Phillips, and makes the defendant her executor, leaving him the bulk of her estate, provided he pays the three legacies of 100*l.* within a year after her death, pursuant to her will. The defendant, within the time, pays to the children's own hands their legacies. The eldest of them was sixteen years old at the time, the next fourteen, and the youngest nine only. And in his answer he denies that he knows this money ever came to the father's hands. But the children have now brought their bill against the
[374] defendant, to be paid their several legacies, suggesting that their father had embezzled the money paid by the defendant during their infancy, and is insolvent; and that this was a fraudulent payment to the father, and therefore it must be paid over again. Lord *Hardwicke* asked the counsel for the defendant, if they knew any instance where an executor paying so large a sum as 100*l.* into the hands of minors, had been allowed such payments: Indeed, in cases where the legacies have been very small, the payment has been allowed by the court. But in this case, notwithstanding the sum is above 100*l.*, yet as the payment by the executor to the children themselves is so fully proved, and not at all controverted by the plaintiffs, and their losing the benefit of it is owing to the negligence and insolvency of the father, I will not strain the rules of this court to make an executor pay it over again; especially as he made this payment to save a forfeiture, it being an express condition of his own taking under the will, that he should discharge their legacies within a year after Mrs. Paget's death. But the next day the lord chancellor said, that upon looking into the cases, he found this a very doubtful point; and unless the defendant will agree to give the plaintiffs something, he would not determine it, without taking time to consider it. The defendant, upon this recommendation of the court, agreed to pay in 50*l.* to be divided between the three plaintiffs; and each side were to abide by their costs; and it was made part of the decree that the 50*l.* was paid by consent of all parties. And his lordship directed each of the plaintiffs, upon receiving their respective shares, to release the legacies under the will. The case of *Doyley* and *Tolferry*, he said, must have had some other circumstances; for the rule is laid down too strictly, that in all cases where executors pay infants' legacies to their fathers, in order to deter executors from such payments, it shall be paid over again. Lord *Cowper* confirmed the decree of the master of the rolls in that case; but he seemeth to have had a remorse of judgment at the time; for in the register's office it appears, his lordship ordered the deposit to be divided between the parties. 2 *Atk.* 80.

And in the case of *Rotheram* and *Fanshaw*, Mar. 25, 1748; lord *Hardwicke* said, *arguendo*, that where a suit is instituted

in the spiritual court, for an infant's legacy, by a father to have it paid into his hands; the court will grant an injunction: because it will not allow the infant's money to come into the father's hands. 3 *Atk.* 629. [1 *Eden.* 276. S. C.] [375]

6. By the civil law, a testator cannot enjoin his executor to pay interest for the non-payment of a legacy. And though interest or usury be only forbidden by the civil law beyond such a sum, yet it being entirely prohibited by the canon law, it follows *a fortiori* that he cannot do it by that law. *Ayl. Par.* 342.

In what case a legacy shall bear interest, and from what time.

And by the laws of this realm, the receiving of interest for money was for a long time prohibited: but afterwards, from the unreasonableness of the thing itself, and the inconvenience thereof to society, these restrictions vanished by degrees, and it became lawful to receive interest within certain bounds prescribed by the legislature; and as in other matters, so also in the case of legacies, the courts both ecclesiastical and temporal have allowed interest to be paid for legacies withheld in certain instances. And, generally, it is said, if a legacy be bequeathed to be paid divers years after the testator's death, this difference is to be observed; if the day were given in favour of the legatee being an infant, who could not safely receive it any sooner, then he shall have the profit; but if the respite was in favour of the executor, then the legatee shall have the bare legacy without interest. *Went.* 352.

M. 1727, *Bilson* and *Sanders.* A legacy was given to an infant, the testator having a great deal of money in bank stock. The executor was residuary legatee. A bill was brought in the exchequer for the legacy. And the question was, whether it should bear interest, and from what time? Chief baron *Pengelly* and baron *Hale:* It is a certain rule, that where a fund is certain, as where charged on land, it shall bear interest, because it plainly appears the rents are received: So the fund on which it is charged produces a profit here, it is equally certain, and therefore should bear interest, and should be from the testator's death. But this was opposed by *Carter* and *Comyns*, barons, that it should only bear interest from a year after the testator's death (4); for as legacies are to be paid after debts, the executor

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(4) This is the rule, unless some other period is fixed by the will, and so even though actual payment within that time may, in many cases, be practicable. *Wood* v. *Penoyre*, 13 *Ves.* 333. *Gibson* v. *Bolt*, 7 *Ves.* 97. *Pearson* v. *Pearson*, 1 *Sch. & Lef.* 12. 14. *Birmingham* v. *Kirwan*, 2 *id.* 444. The principle on which interest is computed on legacies from a year after the death of the testator, is the presumption that the property is got in at that time, and is making interest. *Bourke* v. *Rickets*, *M.* 1804. 10 *Ves.* 333. The old rule depending on the fund, whether productive or barren, is exploded. *Gibson* v. *Bolt, supra.* *Webster* v. *Hall*, 8 *Ves.* 413.

has that time to inquire, till which time they are not payable, so not to bear interest: which was agreed. A difference was offered to be made, that as there was a legacy to an infant, it could not be safely paid, and therefore could not bear interest. To which it was answered by the chief baron, that it might be safely paid into the hands of an infant, having proper evidence
[376] of the payment, as in *Wentworth's Executor*, 313. And by *Carter*, it may be paid into the hands of the guardian, having evidence; but if he takes security from the guardian which should prove defective, there, as he doth not rely on the security the law gives, he must depend on that taken at his peril. *Select Cases in Chancery*, 72. *Bunb.* 240.

June 22, 1743, *Butler* and *Freeman.* The grandfather of the plaintiff, by will, after directing his debts and legacies to be paid, gives all the rest and residue of his personal estate to his grandson the plaintiff at his age of 21, and if he die before that age, then to the defendant Freeman, whom he makes his executor. The plaintiff brought his bill for the interest of the residue, to be paid to him during his infancy. The defendant Freeman by his answer insisted, that the plaintiff is not entitled to it, unless he attains his age of 21; but that it ought to accumulate: and if the plaintiff dies before 21, that it will equally belong to the defendant with the residue. The father of the plaintiff insisted, that the residue must be confined to what the testator left at the time of his death, and that the interest made after his death ought to be considered as an undisposed part, and go to him as next of kin to the testator, according to the statute of distribution: or if the court should be against him in this point, that then he is entitled to receive it for the maintenance of the plaintiff. By the lord chancellor *Hardwicke:* I am of opinion, that the plaintiff is not entitled to the interest that arises from this residue; and though the words *rest and residue* must be confined to what shall be found at the death of the testator, after his debts, funeral expences, and legacies are paid, yet that the interest ought to accumulate till the plaintiff arrives at his age of 21, and as often as it amounts to a competent sum to be placed out by a trustee appointed by the master. I am not quite so clear how the interest would go, if the accident should happen of the plaintiff's dying before 21, whether to the representative of the plaintiff, or to the defendant Freeman: but that is not necessary to be enquired into at this time. As to the father's claim, I am of opinion he has no right to the interest, because the testator has given *all the rest and residue* of his personal estate, so that he cannot be said to have left any part undisposed, and consequently can have no title to it as next of kin under the statute of distribution. For as the devise of the residue is contingent, it not vesting till the grandson's age of 21,

the interest is so likewise, and must accumulate in the mean time; nor can the father by the rules of this court entitle himself to it as maintenance for the infant, because it is given by a grandfather to a grandson upon a contingency of attaining his age of 21; and as nothing is said how the produce of it shall be applied, he is not entitled as a grandson to be maintained out of the produce. The law of nature obliges only fathers to maintain their children; and unless the child, from the mean circumstances of the parent, is in danger of perishing for want, the court will not direct the interest that shall be made of a contingent legacy to be applied for that purpose: So that unless the parent is totally incapable, or under particular circumstances, as having a numerous family of children, and is bordering upon necessity, the law of the land and of nature make it incumbent on the parent to maintain his child. In the case of *Acherley* and *Vernon*, 1 *P. Will.* 783, where the testator Mr. Vernon had left 6000*l.* to the plaintiff his niece, to be paid to her at her age of 21, and she insisted that the interest of this money ought to be allowed for her maintenance; lord *Macclesfield* was of opinion, that the interest in that cause ought to follow the principal, for it was a vested legacy, and payable at 21. But there it was a sum of money separated and detached from the rest of the estate, and a vested legacy; here it is a contingent one, and not a specific sum, but of the residue of his personal estate, which makes a difference between the cases; and the father likewise in the present case possessed of a good estate, and in considerable circumstances. Therefore his lordship decreed the interest which has arisen upon the residue of the testator's personal estates since his death, or which may arise, to be paid into the hands of a trustee, to be laid out in real or government securities as often as it shall amount to a competent sum. 3 *Atk.* 58.

July 2, 1744, *Heath* and *Perry*. The testator by his will gave 1000*l.* a-piece to five brothers and sisters, (but who were no relations to him,) to be paid to them at their respective ages of 21, in case they should respectively attain that age, and not otherwise; and if any of them should happen to die before they attain their respective ages of 21, that then and in such case the legacy or legacies of 1000*l.* so given to them respectively shall be void. The legatees brought a bill for interest on their legacies. By lord *Hardwicke*: Cases of this kind, how far a legatee, who is not entitled to the payment of the legacy immediately, shall have interest in the mean time, depend upon particular circumstances. [378]
Some upon relationship, some upon the necessities of legatees, and most of them upon the particular penning of wills; and there is hardly one case which can be cited that is a precedent for another. Some things are certain in these cases; for if a legacy

is given generally at marriage, or at 21, then the vesting and time of payment are the same, and shall not vest till marriage, or 21. To go one step further; where a legacy is actually vested, as if given to an infant payable at 21, yet it shall not carry interest, unless something is said in the will that shews the testator's intention to give interest in the mean time. But all these cases are subject to this exception, if it is in the case of a child; for then let a testator give it how he will, either at 21, or at marriage, or payable at 21, or payable at marriage, and the child has no other provision, the court will give interest by way of maintenance, for they will not presume the father so unnatural as to leave a child destitute. But in the present case, the legatees are mere strangers to the testator; and nothing shall be taken out of the estate for their benefit during their nonage. 3 *Atk.* 101. (5)

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(5) A legacy payable at any given time whatsoever, does not carry interest till that time, whether it is a vested interest or not: the time of payment must govern the commencement of interest, with this difference only, that a legacy given by a parent to a child shall carry interest from the death of the testator, on account of the obligation attaching on the person who gives it to provide a maintenance for his child. *Crickett* v. *Dolby*, 3 *Ves.* 10. *Tyrrell* v. *Tyrrell*, 4 *Ves.* 1. *Coleman* v. *Seymour*, 1 *Ves.* 211. But there is no exception in favour of a *wife*, as for a *child*, to the rule, that a legacy does not bear interest before it is payable. *Stent* v. *Robinson*, 12 *Ves.* 461. *Lowndes* v. *Lowndes*, 15 *Ves.* 301. *Raven* v. *Waite*, 1 *Wils. C. R.* 204. And in *Wynch* v. *Wynch*, 1 *Cox*, 433. An exception is made to the rule between parent and child, where maintenance till the infant attained 21 was provided out of another fund. When legacies are charged on personal estate, and interest is directed to be paid, the court formerly allowed legal interest, *Moore* v. *Moore*, 1746. 3 *Atk.* 402. But the rule that only 4 *per cent.* is allowed, where the will does not mention interest, on portions charged on land, as the land is good security for the principal, (*ibid.* *Guillam* v. *Holland*, 2 *Atk.* 343. *Wood* v. *Briant*, *id.* 523. &c.) has been of late years extended to legacies and portions charged on personal estates, *ibid.* 1 *Ves.* 311. *acc. contra*, 3 *Atk.* 432., 1 *Ves.* 99. 171. But where legacies were devised payable out of money due on mortgage, *when the same should be recovered*, interest at the rate of 4*l.* was decreed from the death of the testator, and it was held not to depend on the time when the money was recovered. *Wood* v. *Penoyre*, 13 *Ves.* 325.

Payment of portions when a satisfaction of legacy.

A parent paying a portion is presumed to intend performance of the gift of a legacy, unless there is sufficient evidence to repel such presumption. *Ellison* v. *Cookson*, *E.* 1790. 2 *Bro. C. C.* 306. 3 *id.* 61. 1 *Ves. jun.* 100. Thus a portion given after a legacy is not a satisfaction of it where it is expressly given in satisfaction of a different claim, or where it is given absolutely, and the legacy under limitations: neither can a legacy be a satisfaction for a claim *aliundè*, unless clearly expressed to be so intended. *Baugh* v. *Read*, 3 *Bro. C. C.* 192. But where a father having a legacy left to his daughter, gave her more than its amount on her marriage, and she acquiesced

Supposing interest to be due, another question arises, from what *time* the interest shall accrue. Concerning which, in the case of *Jolliffe* and *Crew*, *E.* 1701, it was determined as follows: *viz.* If a legacy be devised generally, and no time ascertained for the payment, and the legatee be an infant; he shall be paid interest from the expiration of the first year after the testator's death; but it seems a year shall be allowed, for so long the statute of distribution allows before the distribution be compellable, and so long the executor shall have, that it may appear whether there be any debts: but if the legatee be of full age, he shall only have interest from the time of his demand after the year; for no time of payment being set, it is not payable but upon demand, and he shall not have interest but from the time of his demand: otherwise it is in case of an infant, because no laches are imputed to him. But where a certain legacy is left payable at a day certain; it must be paid with interest from that day. 2 *Salk.* 415. *Prec. Cha.* 161.

And in the case of *Maxwell* and *Wettenhall*, *T.* 1723; the following points were resolved, 1. If one gives a legacy charged upon land, which yields rents and profits, and there is no time of payment mentioned in the will; the legacy shall carry interest from the testator's death, because the land yields profit from that [379] time. 2. But if a legacy be given out of a personal estate, and no time of payment mentioned in the will; this legacy shall carry interest only from the end of the year after the death of the testator. 3. If a legacy be given, charged upon a dry reversion; here it shall carry interest only from a year after the death of the testator, a year being a convenient time for sale. 4. If a legacy be given out of a personal estate, consisting of mortgages carrying interest, or of stocks yielding profits half yearly; it seems in this case the legacy shall carry interest from the death of the testator. 5. If a legacy be brought into court, and the legatee hath notice of it, so that it is his fault not to pray to have the money, or that the money should be put out; the legatee in such case shall lose the interest from the time the money was brought into court: but if the money was put out, the legatee shall have the interest which the money put out by the court did yield. 2 *P. Will.* 26. (*c*)

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during her life, the legacy cannot be demanded after his death. *Seed* v. *Bradford*, 1 *Ves.* 501. See 2 *Vern.* 484. 3 *Atk.* 76.

(*c*) Where a parent gives a legacy to a child unprovided for, the child shall have interest from the day of the parent's death. *Per* sir L. *Kenyon*, M.R. in *Cary* v. *Askew*, 2 *Bro. C. C.* 59. And in *Green* v. *Pigot*, 1 *Bro. C. C.* 103., a legacy being given to a female infant, to be paid at 21, or marriage, with interest at 4 *per cent.* (but if she died before, to sink into the residue); lord *Thurlow* C. ordered the money to be paid into the Bank, in order to secure the legacy; and if greater interest was made, that it should be for the benefit of the

As to the *quantum* of interest, the determinations have been various: in the case of *Guillam* and *Holland*, Oct. 14. 1741[r]; lord *Hardwicke* said, where a portion is charged upon land, and the will doth not mention interest, the court will not give any more than 4 *per cent.* though the legal interest is 5 *per cent.*, and this rule hath also been extended to the cases of legacies and portions charged upon personal estate. 2 *Atk.* 343.

In the case of *Incledon* and *Northcote*, Mar. 2. 1746; lord *Hardwicke* said at first, as no more had been allowed for many years than 4 *per cent.* interest to children for maintenance, he did not care to break through the rule; but afterwards, in consider-
[380] ation of the interest of money being altered lately, mortgages being then at four and a half, and several at five *per cent.*, he ordered the children should have four and a half *per cent.* interest. 3 *Atk.* 438.

In *Bryant* and *Speke*, Dec. 6. 1748; lord *Hardwicke* said, the general rule is, that legacies out of real estate carry one *per cent.* lower than legal interest; but if out of personal estate, because of the higher interest of money than land, it shall carry the legal interest, unless particular circumstances induce the court to vary therefrom. And this, he said, was in conformity to the ecclesiastical court, which gives legal interest upon legacies out of personal estate. 1 *Vez.* 171.

In *Beckford* and *Tobin*, Nov. 4. 1749; it was said by the lord chancellor *Hardwicke*, that in general the court exercises as large a discretion as to the rate of interest upon legacies, where interest is not particularly given, as in any case; and that it is difficult to reduce it to a certain rule. The most general rule hath been, between interest of legacies charged on land, and on personal estate; and where nothing more, the court has said, that land never produces profit equal to the interest of money, and will follow the course of things, and give interest, where charged on land, one *per cent.* lower than the legal interest. So it was when the legal interest was at six; but in general, where a legacy is out of personal estate, the court gives five; and unless that is taken to be a sort of rule, there will be no distinction between them. Nevertheless, in the present case, the fund out of which the interest was to arise yielding no more than four, the court allowed but four *per cent.* 1 *Vez.* 308.

Sitwell v. *Bernard.* The general rule is, that legacies (where no interest is given by the will) shall carry interest at four *per cent.* only from the end of a year after the death of the testator,

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child. But an executor cannot appropriate a legacy in this manner without the direction of the court; for if the stock fall in value, his estate must make good the difference. *Cowper* v. *Douglas*, 1 *Bro. C. C.* 231. [See 378. *note* 5.]

(except where it is given by way of maintenance) though the fund produces more. 6 *Ves.* 520.

M. 1733. *Ferrers* and *Ferrers.* The countess dowager of Ferrers was by settlement and will of her late husband, earl Robert, entitled to a jointure estate of 1000*l.* a year, but was kept out of possession by earl Washington, the son of earl Robert by a former venter: and now insisted upon the arrears, and interest, from the time of her husband's death; comparing it to the case of arrears of an annuity, or rent charge, which are decreed to be paid with interest. By *Talbot* lord chancellor. The arrears of an annuity or rent charge are never decreed to be paid with interest, but where the sum is certain and fixed; and also where there is either a clause of entry, or *nomine pœnæ*, or some penalty upon the grantor which he must undergo, if the grantee sued at law: and which would oblige him to come into this court for relief, which the court will not grant but upon equal terms, and those can be no other but decreeing the grantor to pay the arrears, with interest for the time during which the payment was [381] withheld; but interest for the rents and profits of an estate was never decreed yet, the same being entirely uncertain. And though it may be said, that the lady is entitled to an estate of 1000*l.* a year, yet that is not sufficiently certain; being only a perception of the profits of an estate, which are not to be paid at any one certain time, but only as the tenants of the land bring them in, some at one time, some at another. *Cas. Talb.* 2.

Maintenance and education, how far to be allowed.

7. *M.* 16 *C.* 2. *Rennesey* and *Parrot.* A legacy was made payable at the age of twenty-one years. The legatee by his guardian brought a bill against the executor for maintenance, suggesting that he had none. The executor demurred; for that the plaintiff was under age, and the legacy was not payable till twenty-one, and therefore no cause of suit. But the demurrer was over-ruled. 1 *Cha. Ca.* 60.

E. 1722. *Harvey* and *Harvey.* The testator being seised of a real estate, and possessed of a personal estate, and having several children, deviseth all his real and personal estate to his eldest son, charging the same with 1000*l.* a-piece to all his younger children, payable at their respective ages of 21; but in the will no notice is taken of maintenance for the younger children in the mean time. The younger children bring their bill, in order to recover interest, or some maintenance during their infancy. Upon which, the master of the rolls decreed, that the younger children should recover maintenance. He observed, that these being vested legacies, and no devise over, it would be extremely hard that the children should starve, when intitled to so considerable legacies, for the sake of their executors or administrators, who in case of their deaths would have the said legacies. That in this case, the court would do, what in common presump-

tion the father (if living) would and ought to have done, which was, to provide necessaries for his children. That a court of equity would make hard shifts for the provision of children; as where younger children were left destitute, and the eldest an infant, equity would make such a liberal allowance to the guardian of the eldest, as that he might thereout be enabled to maintain all the children; and for the same reason the court would likewise take a latitude in this case; that since interest was pretty much in the breast of the court, though the will were silent with regard to that, yet it should be presumed that the father, who gave these [382] legacies, intended they should carry interest, if the estate would bear it; for every one must suppose it to have been the intention of the father, that his children should not want bread during their infancy: that for this reason it had been held, that though a legacy were devised over in case of the legatee's dying before twenty-one, yet the infant legatee ought to have interest allowed him during his infancy, in order for his maintenance; with this difference only, that where the estate has appeared to be small, the court, in whose discretion it always lies to determine the quantum of interest, has ordered the lower interest: and it seemeth that if one, not a parent, gives a legacy to an infant, payable at twenty-one, without any devise over, and the infant has nothing else to subsist on; the court will order part of this legacy, in order to provide bread for the infant, to be paid presently, allowing interest for the same to the person paying it, out of the remaining principal; though this is done very sparingly. 2 *P. Will.* 21.

M. 1684. *Barlow* and *Grant*. Upon a bill for 100*l.* legacy given to a child, the defendant insisted upon an allowance of 16*l.* a year, for keeping the legatee at school. It was objected, that only the bare interest of the money ought to have been expended in his education, and not to have sunk the principal, as in this case the defendant had done. But the lord keeper thought it fit and reasonable to be allowed; and said, the money laid out in the child's education was most advantageous and beneficial for the infant, and therefore he should make no scruple of breaking into the principal, where so small a sum was devised, that the interest thereof would not suffice to give the legatee a competent maintenance and education; but in case of a legacy of 1000*l.*, or the like, there it might be reasonable to restrain the maintenance to the interest of the money. 1 *Vern.* 255.

But if the legacy is devised over, it seemeth to be otherwise; and that the court in such case will not diminish the principal, but only allow the interest thereof to the first legatee, until the time that the legacy shall become payable. 1 *Cha. Ca.* *Leech* and *Leech*, *H.* 26 & 27 *C.* 2. *Prec. Cha.* 195. *Brewin* and *Brewin*, *E.* 1702.

Also a legacy in the hands of the father given to his children by a relation or other, shall not be diminished by the father; because he is obliged to maintain his own children: As in the case of *Darley* and *Darley*, Dec. 6, 1746. A bill was brought by the plaintiff for two legacies of 50*l.* each, left to himself and [383] his sister under the will of their grandfather, and for the interest that has been made thereof. The sister's legacy he claims by assignment from her. The defendant, being executor to the father, insists he is not obliged to account to the plaintiff for principal or interest, one hundred and five pounds being expended for putting him out apprentice, and much more than fifty pounds in the maintenance and clothing of the sister. By the lord chancellor *Hardwicke*: Where legacies are given to a child by a relation, a father cannot make use of such legacy in maintenance of the child, but must provide for him out of his own pocket: nor can he set him out in the world, or put him out an apprentice, or clerk, with the money arising from the legacy: and if he does, he shall not be allowed it. And he ordered interest to be computed on the legacies given to the plaintiff and his sister, from the time they respectively attained their ages of twenty-one, at 5 *per cent.*, and that what shall be found due for principal and interest of these legacies be paid by the defendant to the plaintiff, he having admitted assets of the father for that purpose. 3 *Atk.* 399.

Aynsworth v. *Pratchett.* In this case the testator devised his real and personal estate to trustees, upon trust to pay to his wife for her life such annual sum, as would, with the rents and profits of his estate settled upon her, make up 100*l. per annum*, and for the maintenance of his children the further sum of 30*l. per annum* each, so long as they should remain under her care. His daughter was entitled to 1000*l.* under the will, as her fortune at the age of twenty-one, and the residue was to be divided amongst his sons with survivorship. An increase of maintenance was ordered on the ground of the allowance under the will being insufficient. 13 *Ves.* 321.

8. Nov. 4. 1684. *Palmer* and *Trevor.* Morley devised 100*l.* to his daughter Eliz. Palmer, a *feme covert*, and dies. The executor pays it to Elizabeth, who spends it in her own maintenance. Her husband sues for it; and the question was, whether this was a good payment to the wife, it being in proof that at the time of making the will, Palmer and his wife lived apart, and the husband did not allow her maintenance; and so it is a strong presumption that the devisor intended this for her separate use. By the lord keeper: If it had been so given in express terms, the payment to her had been good; but as it is, the husband must have it decreed: he said, that in case where a tenant paid his rent to his landlady, not knowing that she was married,

Payment to a *feme covert.*

yet the husband made him pay it over again, and no help for it. Moreover the will appointing the legacy to be paid within six months after the testator's decease; the lord keeper decreed the husband interest from that time, but if no time limited, no interest. 1 *Vern.* 261. (*d*)

[384] Security to refund. 9. In the case of *Grove* and *Banson, M.* 21 *Car.* It is said generally, that an executor is not bound to pay a legacy, without security to refund, in case there be a defect of assets. 1 *Cha. Cas.* 149.

And in the case of *Noel* and *Robinson, M.* 1682, it was said, that if they give sentence in the ecclesiastical court for the payment of a legacy, a prohibition will lie, unless they take security to refund in case of insufficiency of goods to discharge debts, and the like; for a diminution of legacies is to be made *pro rata*, if the testator's estate will not extend to pay them all. 2 *Vent.* 358. 3 *Bac. Abr.* 483. *Ayl. Par.* 343.

And Mr. *Oughton* says, If the testator hath given bond with any person, for the payment of a debt after certain years to come, or for the performance of any covenants or contracts at a future day; although the executor in this case hath goods in his hands sufficient to pay the legacies, yet if the said sum for which the testator was bound is not paid, or the said covenants be not fulfilled, in such case, the executor for his indemnity may offer judicially the legacy upon this condition, that the legatary first give proper security to keep him indemnified with respect to the debts and covenants aforesaid, at least proportionably, regard being had to the other legacies. Which if the legatary shall refuse, the executor may leave the same with the register upon the condition. 1 *Ought.* 369, 370.

The form of which security to be given as aforesaid, may be thus:

" Know all men by these presents, &c." (as in the common form of bonds):

" Whereas E. F. late of —— deceased, did on the —— day " of —— duly make and execute his last will and testament, and " did therein, amongst other legacies, give and bequeath unto " the above bounden A. B. the sum of —— and therein and " thereof did name and appoint the above-named C. D. executor, " who hath proved the same in the consistory court of —— and " taken upon himself the execution thereof: And whereas the

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(*d*) But if the husband sue for a personal legacy given to the wife, the court will not compel the payment of it till a proper settlement be made on her. *Brown* v. *Elton*, 3 *P. Wms.* 202. cited *supra*, 3. *in note*. A legacy to a married woman, subject of a foreign state, was decreed to be paid to the husband, to whom it would by the law of that country belong. *Campbell* v. *French*, 3 *Ves.* 321.

" said C. D. hath, at the request of the said A. B., actually paid
" to him the said A. B. the whole legacy of —, although there
" may be cause to apprehend a deficiency of assets for payment
" of the other legacies. The condition of this obligation is
" such, that if such deficiency shall actually and *bonâ fide* happen,
" the said A. B., his executors or administrators, shall within —
" days next after request in that behalf to him made, refund and [385]
" pay back unto him the said C. D., his executor or executors,
" administrator or administrators, his or their rateable part or
" share of such deficiency. Then this obligation to be void,
" otherwise of force."

And in a court of equity, common justice will compel a legatee to refund, although no security hath been given for that purpose. 1 *Vern.* 93, 94.

And by the lord chancellor *Hardwicke*, legatees are not obliged to give security to refund upon a deficiency of assets, 1 *Atk.* 491. 1 *Vez.* 342.

And the rule is, where an executor pays a legacy, the presumption is, that he hath sufficient to pay all legacies, and the court will oblige him, if solvent, to pay the rest, and not permit him to bring a bill to compel the legatee, whom he voluntarily paid to refund; although, if the executor prove insolvent, so that there is no other way, the court will admit a bill by the other legatees to compel that legatee to refund. 2 *Vez.* 194.

If assets fall short, in what case legatees shall abate.

10. The ancient law was, that if a man bequeath 20*l.* to one, and 20*l.* to another, and 20*l.* to a third, and makes his executor and dies, having goods but to the value of 20*l.* in all; of which goods the executor maketh an inventory: in this case he may pay which of the three he pleaseth his whole legacy, and the other two are without remedy: or he may, if he please, pay every one of them a rateable part: and in case the executor make no inventory, yet he is chargeable no further than the value of the goods; and so if every legatary in such case should sue him, they must prove sufficiency of goods, or otherwise they shall get nothing. *Curs.* 186. (6)

But Mr. *Clark* says (agreeably to the rule in the courts of equity), If after payment of the debts and funeral expences there be not sufficient for all the legataries, there must be a proportionable distribution according to the quantity of each legacy. 1 *Ought.* 366.

And Dr. *Swinburne* says, If the executor do make an inventory according to the laws and statutes of this realm; then he need not

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(6) Suit for a legacy brought by legatees against an executor was not sustained, where a certain deduction was necessary to be made for testator's debts. *Clarke and Clarke* v. *Douce and Eagleton*, 2 *Phill. Rep.* 335.

pay to any legatary his whole legacy, though he be first named in the will, in case there is not sufficient to answer unto every legatary his whole legacy; but may retain a rateable part or proportionable deduction from every legacy; saving in certain cases: whereof one is, when some special thing is bequeathed, as the testator's signet, or his white horse; which special legacy
[386] (as some do deem) is to be satisfied and paid wholly without diminution, in respect of any other general legacies, or of legacies which consist in quantity. Another case is, when the father doth bequeath something to his daughter for her dower, or towards her marriage. Another is, when the testator doth bequeath any thing in satisfaction or recompence for some injury by him done, or of goods evil gotten. For those legacies are not to be diminished by reason of other general legacies, or legacies consisting in quantity, which shall remain wholly unsatisfied, rather than those aforesaid legacies shall be diminished; and consequently in these cases, it is not in the power of the executor to gratify any other legatary at his election. *Swin.* 227, 228.

And he says, further, that if the executor enter to the testator's goods, and will make no inventory thereof, then may every legatary recover his whole legacy at his hands; for in this case the law presumeth, that there is sufficient goods to pay all the legacies, and that the executor doth secretly and fraudulently subtract the same: whereas, otherwise, the executor is presumed not to have any more goods which were the testator's than are described in the inventory, the same being lawfully made. *Swin.* 228, 229.

And although the testator made no provision for refunding, yet the common justice of a court of equity will compel a legatee to refund; and it is certain that a creditor shall compel a legatee, and that one legatee shall compel another to refund, where there is a defect of assets. [*Noel* v. *Robinson.*] 1 *Vern.* 94. [2 *Cha. R.* 248. 2 *Cha. Ca.* 145. 1 *Vern.* 90. 453. 460. S. C. *Hodges* v. *Waddington*, 2 *Ventr.* 360. S. P. *Newman* v. *Barton*, 2 *Vern.* 305. S. P.]

And even if one of the legatees get a decree for his legacy, and is paid, and afterwards a deficiency happens; the legatee who recovered shall refund notwithstanding. *Anon.* 1 *P. Will.* 495.

But if the executor had at first enough to pay all the legacies, and afterwards, by his wasting the assets, occasions a deficiency: the legatee who has recovered his legacy, shall have the advantage of his legal diligence, which the other legatees neglected by not bringing their suit in time. *Id.*

And although a legatee shall refund against creditors, if there be not sufficient assets to pay all the debts [1 *Vern.* 162.]; and likewise against legatees, where all of them have not an equal
[387] share, in regard of assets falling short; yet it hath been said, that an executor himself shall never bring a legacy back when he hath once assented to it, unless he paid the debts of the testator

by compulsion. *M.* 1682. *Noel* and *Robinson*, 1 *Vern.* 90. 2 *Ventr.* 358.

And the author of the *Law of Executors* saith, that if an executor voluntarily pay a legacy, and afterwards debts appear, he cannot compel the legatee in equity to refund. *Law of Ex.* 186. (7)

But more particularly the author of the *Law of Testaments* observeth, that if an executor applies the assets in satisfaction of legacies, and afterwards debts appear, *of which he had no notice* at the time of paying the legacies, he may compel the legatees to refund. *Nelthorpe* v. *Hill*, 1 *Cha. Cas.* 136. So he may, if compelled by a decree in chancery to pay legacies: but if an executor voluntarily pays a legacy, and afterwards assets prove deficient to pay the other legacies; neither the executor nor any of the other legatees shall compel such legatee to refund. *Newman* v. *Barton*, 2 *Vern.* 205. *Law of Test.* 260, 261. (8)

But in the case of *Noel* and *Robinson*, before mentioned, it was said by the lord chancellor to be a point not as yet determined, whether the executor himself, after he hath once voluntarily assented to a legacy, shall compel the legatee to refund. 1 *Vern.* 94.

And in the case of *Davis* and *Davis*, *E.* 4 *G.* On a bill by an executor against a legatee, to refund a legacy voluntarily paid him by the executor, the assets falling short to satisfy the testator's debts; it was decreed by Sir Joseph Jekyll, master of the rolls, that the defendant should refund to the plaintiff; and that an executor may bring a bill against a legatee to refund a legacy voluntarily paid him, as well as a creditor; for the executor, paying a debt of the testator out of his own pocket, stands in the place of the creditor, and has the same equity against a legatee to compel him to refund. *Viner*, Devise, Q. d. 35.

So where a specific legacy is devised, the legatee must have it entire, though there are not sufficient assets to pay the rest of the legacies (*e*); But if 100*l.* is devised to one, and several money

Specific legacy or devise.

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(7) But must personally answer an unsatisfied legatee. *Vintner* v. *Pix*, 1 *Ch. R.* 133. *Tilsy* v. *Throckmorton*, 2 *Ch. Ca.* 132. And therefore the executor is always to be made a party to a suit against legatees for refunding, on deficiency of assets. *Nelthorpe* v. *Hill*, 1 *Ch. Ca.* 136. *Hixon* v. *Witham*, *ib.* 248.

(8) *Hodges* v. *Waddington*, 2 *Ch. Ca.* 9. A legatee voluntarily paid by the executor need not refund, unless the executor becomes insolvent. *Orr* v. *Kaimes*, 2 *Ves.* 194.

(*e*) If one gives a specific legacy of a horse, diamond, or land, and also a pecuniary legacy, and there are not assets to pay both; the specific legatee shall be preferred, and have his whole legacy: for were the executor to make him contribute towards the pecuniary legacy, this would be, *pro tanto*, to make such specific legatee buy his legacy, against the manifest intention of the testator. *Clifton* v.

legacies to others, and the testator directs that the legacy of 100*l.* shall be paid *in the first place;* yet if the other legacies fall short, the legatee of 100*l.* must make a proportionable abatement of this legacy. *H.* 1681. *Brown* and *Allen*, 1 *Vern.* 31.

In the case of *Blower* and *Morret*, July 10, 1752; Lands were devised to trustees to be sold, for payment of debts and legacies; the testator afterwards gives to his wife a general legacy of 500*l.*, to be paid to her immediately after his decease, out of the first money that should be got in after his death. It was insisted this

[389] 500*l.* legacy should not abate in proportion with others, from the particular directions attending it. By lord *Hardwicke:* Cases of this kind, of a claim by pecuniary legatees of a priority of satisfaction, so as not to abate in proportion with others, seldom come before the court; and there are fewer in which the court has given way to claims of that kind: there must be, therefore, very strong words to induce the court to give way to it; for in most

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Burt, 1 *P. Wms.* 678. But if the question is between two or more specific devisees, they shall contribute equally on a deficiency of assets: Thus one seised in fee of land, and possessed of a lease for years, devised the fee to A. and the lease to B., and died indebted by bond; on a deficiency of assets, both devisees were ordered to contribute to the payment of the bond, but the simple contract debts to fall on the leasehold estate. *Long* v. *Short*, 1 *P. Wms.* 403. But had the fee been mortgaged, A. would have taken it *cum onere. Infra, Oneal* v. *Meade*, unless the testator had added "after payment of all debts." *Carter* v. *Barnardiston*, 1 *P. Wms.* 505. in which case the specific devisees of land incumbered, and land unincumbered, shall contribute to discharge the mortgage. [And see *Bridgm. Dig.* tit. *Legacy*, V. VII.] But where the question was not between two specific devisees, but a specific devisee of land incumbered by mortgage, and the heir taking by descent, lord *Hardwicke*, C., after great consideration, decreed that the land devised should be exonerated out of the real assets descended. *Galton* v. *Hancock*, 2 *Atk.* 430. If lands be devised to pay debts, a legatee, whether specific or pecuniary, shall be paid out of the lands, if the simple contract creditors have exhausted the personalty. *Haslewood* v. *Pope*, 3 *P. Wms.* 322. In order to give effect to these rules for the payment of legacies, the court either makes an equitable arrangement of the assets in the nature of marshalling them; that is, if there are two claimants, one of whom can resort to the real estate, and the other cannot, directs the first to resort to that fund on which the second has no lien; or if the first receive satisfaction out of the personalty, allows the second to stand in his place, *pro tanto*, against the real estate. But the court does not primarily subject any fund to a claim to which it is not subject by the nature of the claim. See the cases cited by Mr. *Coxe*, in his note to the case of *Clifton* v. *Burt*, 1 *P. Wms.* 679.; and as to what is a sufficient description to render a legacy specific, see the cases collected by Mr. *Fonblanque* in his note to *Treat. of Eq. B.* 4. *Pt.* 1. c. 2. § 5.

Marshalling assets, [See *ante.*]

cases, the court has disclaimed the laying weight on particular words, as the saying *imprimis*, or *in the first place*, or a direction for the time of payment; because if the court was upon such grounds to give a preference to one pecuniary legatee, there would be no end of it, considering the variety of expression, and the incorrectness with which wills are frequently drawn. And I am of opinion, that the direction, to be paid to his wife immediately after his decease, is not sufficient to give her a preference; for that only relates to the time of payment. He directs, that whereas the general rule of law is, that legacies should not be paid until a year, this shall be paid immediately. The consequence is, that if it is not then paid, it should carry interest immediately; which is always considered as a compensation for delay of payment, and puts her in the same condition as if it was paid. 2 *Vez.* 420.

In the case of *Oneale* and *Meade*, *H.* 1720. A man seised of an estate in fee, which he had mortgaged for 500*l.*, and *also* possessed of a leasehold, devised the mortgaged estate to his eldest son in fee, and the leasehold estate to his wife, and died; leaving debts which would exhaust all his personal estate, except the leasehold given to his wife. The question was, whether there being (as usual) a covenant to pay the mortgage money, the leasehold premises devised to his wife should be liable to discharge the mortgage. It was decreed by the master of the rolls, that as the testator had charged his real estate by this mortgage, and also specifically bequeathed the leasehold to his wife, the heir shall not disappoint her legacy, by laying the mortgage debt upon it, as he might have done, had it not been specifically devised; and though the mortgaged premises were also specifically given to the heir, yet he must take them with their burden, as probably they were intended; and that by this construction, each devise would take effect: and that this resolution did not in the least interfere with the case of *Clifton* and *Burt*, *M.* 1720, (1 *P. Will.* 678. *et sup. in not.*) because in that case there was no mortgage. 1 *P. Will.* 693. [390]

And as there is a benefit to a specific legatee that he shall not contribute, so there is a hazard the other way; for instance, if such specific legacy, being a lease, be evicted, or being goods be lost or burnt, or being a debt be lost by the insolvency of the debtor, in all these cases the specific legatee shall have no contribution from the other legatees, and therefore shall pay no contribution towards them. 1 *P. Will.* 540. (*g*)

(*g*) If a specific legacy be retained by an executor for assets, but is not wanted, the legatee is entitled to the original value in case of depreciation. *Chaworth* v. *Beech*, 4 *Ves.* 555. The inclination of the court is against specific legacies; and the rule is to determine on

But the devisee of an annuity for life, charged on the personal estate, where there is a deficiency of assets, shall abate in proportion with the other legatees; for this is not to be considered as a specific legacy. 3 *Atk.* 693. (*h*)

Also charities, though preferred by the civil law, yet they ought to abate in proportion. 2 *P. Will.* 25.

And if the testator's personal estate is not sufficient to pay all legacies, the executors having legacies bequeathed them shall abate in proportion with the other legatees, even though the legacies be given them for their care and trouble, and not generally; for those are only words of course; and as they need not take upon them the office unless they please, they accept the legacies subject to that contingency. 2 *P. Will.* 25. *Barnard. Cha. Rep.* 435. 2 *Atk.* 171.

In like manner, land legatees and money legatees shall abate proportionably. 2 *Cha. Ca.* 155.

If the executor hath only bad debts, he may offer to assign them to the legatee, and shall be quit. 1 *Ought.* 370, 371.

If a man by will gives a lease, or a horse, or any specific legacy, and leaves a debt by mortgage or bond, in which the heir is bound; the heir shall not compel the specific legatee to part with his legacy in ease of the real estate; for though the creditor may subject this specific legacy to his debt, yet the specific or other legatee shall in equity stand in the place of the bond creditor or mortgagee, and take as much out of the real assets, as such creditor by bond or mortgage shall have taken from his specific or other legacy. 1 *P. Will.* 730.

But if one owes debts by bond or mortgage, and deviseth his lands to another in fee, and leaves a specific legacy, and dies, and the bond creditor or mortgagee comes upon the specific legacy
[391] for payment of his debt; the specific legatee shall not stand in the place of the bond creditor or mortgagee to charge the land: because the devisee of the land is as much a specific devisee as the legatee of a specific legacy; for it was as much the testator's intention that the devisee should have the land, as that the other should have the legacy; and a specific legacy is never broke in

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the face of the will, whether the legacy is specific or pecuniary, and not to travel into the account of the effects, to see whether that affords a foundation for making a legacy specific. *Innes* v. *Johnson*, 4 *Ves.* 568. A legacy is not specific, without something to mark the specific thing :-as by describing it " my stock." A mere direction to transfer so much stock to a person is not sufficient to make a legacy specific. *Sibley* v. *Perry*, 7 *Ves.* 522.

(*h*) An annuitant falls under the general character of a legatee, unless distinguished by the testator: it was therefore held that he was entitled to share under a residuary bequest in favour of legatees. *Sibley* v. *Perry*, 7 *Ves.* 522.

upon, in order to make good a pecuniary one. 3 *P. Will.* 324. *Haslewood* v. *Pope*, 2 *Salk.* 416. *Hern* v. *Merick.* (*i*)

But if a man, indebted by mortgage, deviseth his lands to another in fee (after payment of his debts and funeral charges), and also doth bequeath divers pecuniary legacies, and the personal estate is not sufficient to satisfy both the legacies and the mortgage: in such case, if the mortgagee shall not hold to the real, but shall fall upon the personal estate, the legatees shall stand in his room for so much out of the real estate as he shall take out of the personal; that being a proper fund for their payment. *Cas. Talb.* 53.

So if a man give legacies to his daughters, charging his real estate with the payment thereof; and other legacies to his brother, without charging his real estate with the payment of these; if the daughters recover their legacies out of the personal estate, then the brother shall stand in the place of the daughters, and take so much out of the land for his legacy, as the daughters had exhausted out of the personal assets. 2 *P. Will.* (619.)

A legacy charged upon a real estate, and payable at a future day, sinks as to the real estate by the death of the legatee before the time of payment, and the assets cannot be marshalled. *Pearce* v. *Loman*, 3 *Ves.* 135.

11. Where there are divers executors, and some of them are dead, the legatary must sue the surviving executors, and not the executors or administrators of those that are dead. And if all the executors are dead, he must sue the executors or administrators of him that died last, and not the executors or administrators of the rest: and the reason is, because it is presumed, that the goods of the deceased not administered by the other executors, remained with the surviving executor; or if they [392]

Co-executor dying, who shall be sued.

(*i*) It does not appear in *Hern* v. *Merick*, as in *Haslewood* v. *Pope*, that the pecuniary legacy was *specific*. The case, with the reason of the decision, is thus stated by C. B. *Gilbert*, in *Lex Prætoria*, § *Wills*:—"A. seised in fee and indebted by bonds, gives by his will legacies to his younger children (whom he had otherwise provided for before), and devises his land to his eldest son in tail, whom he also made executor. The eldest son pays the bonds with the personal estate: whereupon the legatees, in the place of the bond creditors, bring their bill against the real estate, to be paid out of it; and the bill was dismissed, *first*, because where there is an express specific legacy of any particular thing, they do not commonly break into such specific legacies in favour of the pecuniary legacies: But, *secondly*, because the children in this case being provided for in the life of the testator, their legacies are not upon meritorious consideration, (as in satisfaction of a debt, or as provision for younger children,) and therefore according to a former rule, being mere volunteers, they are not to induce a charge on the real estate."

did not, it was through his own default; because when the other executors were dead, he might and ought to have proceeded against their executors or administrators for restitution of the goods not administered. 1 *Ought.* 364.

Testator appointing his debtor executor. If a creditor appoint a debtor his executor, such appointment shall operate as a release and extinguishment of the debt, on the principle that, from that act of the testator, it may be reasonably inferred that such was his meaning. The debt, under these circumstances, is considered in the nature of a specific bequest or legacy to the debtor, for the purpose of discharging the debt. Thus, if the obligee of a bond made the obligor his executor, this amounts to a release of the debt. *Toller's Law of Executors*, 272.

So, if an obligee in a joint and several bond, make one of two obligors his executor with others, the action on the bond is discharged as to both obligors. (*k*)

II. *Concerning the distribution of intestates' effects.*

And herein

i. *Of the statutes of distribution.*
ii. *Of customs in particular places.* (Page 434.)
iii. *Of the custom of the city of London in particular.* (Page 441.)
iv. *Of the custom of the province of York.* (Page 452.)
v. *Of the custom within the principality of Wales.* (Page 477.)

i. *Of the statutes of distribution.* (*l*)

By the 22 & 23 *C.* 2. *c.* 10. commonly called the *Statute of Distribution* (9), it is enacted as followeth:

All ordinaries, as well the judges of the prerogative courts of *Canterbury* and *York*, as other ordinaries and ecclesiastical judges, and every of them, having power to commit administration of the goods of persons dying intestate, shall and may, and

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(*k*) *Cheetham* v. *Ward*, 1 *Bos. & Pul.* 630.

(*l*) By the statutes quoted by the author, the distribution of a testator's personal estate is given to the ecclesiastical courts; but a bill for that purpose is very proper in the court of chancery, for the spiritual court has but a lame jurisdiction in that case. *Treat. of Eq. Ed. Fonb.* 322.

(9) This act was penned by sir *Walter Walker*, a civilian (*The King* v. *Rains*, or *Pett* v. *Pett*, *T.*1700. 1 *Lord Raym.* 574.), and shall be construed by the rules of the *civil* and not by the *canon* law, except in some particular instances therein mentioned; there being a difference between these laws in computing the degrees of proximity. *Mentney* v. *Petty*, *Pre. Ch.* 594. See other cases, 410, *note*.

are *enabled to proceed and call administrators to account*, for and touching the goods *of any person dying intestate;* and upon hearing and due consideration thereof, *to order and make just and equal distribution* of what remaineth clear (after all debts, funerals, and just expences of every sort first allowed and deducted) amongst the wife and children, or children's children, if any such be, or otherwise to the next of kindred to the dead person in equal degree, or legally representing their stocks *pro suo cuique jure*, according to the laws in such cases, and the rules and limitations hereafter set down; and the same distributions to decree and settle, and to compel such administrators to observe and pay the same by the due course of his majesty's ecclesiastical laws: saving to every one supposing him or themselves aggrieved, their right of appeal, as was always in such cases used. 22 & 23 *C.* 2. *c.* 10. § 3. [393]

Provided, that this act, or any thing herein contained, *shall not any ways prejudice or hinder the customs observed within the city of London, or within the province of York, or other places*, having known and received customs peculiar to them; but that the same customs may be observed as formerly, any thing herein contained to the contrary notwithstanding. § 4.

And all ordinaries and other persons by this act enabled to make distribution of the surplusage of the estate of any person dying intestate, shall distribute the whole surplusage of such estate or estates, in manner and form following; that is to say, *one-third part of the said surplusage to the wife of the intestate*, and all *the residue* by equal portions, *to and amongst the children* of such persons dying intestate, and such persons as legally represent such children, in case any of the said children be then dead, *other than such child or children* (*not being heir at law*) who shall have any estate by the settlement of the intestate, or shall be advanced by the intestate in his lifetime, by portion or portions equal to the share which shall by such distribution be allotted to the other children, to whom such distribution is to be made: and in case any child, other than the heir at law, *who shall have any estate by settlement from the said intestate, or shall be advanced by the said intestate in his lifetime by portion not equal to the share which will be due to the other children* by such distribution as aforesaid: then so much of the surplusage of the estate of such intestate, to be distributed to such child or children as shall have any land by settlement from the intestate, or were advanced in the lifetime of the intestate, as shall make the estate of all the said children to be equal as near as can be estimated: but the heir at law, notwithstanding any land that he shall have by descent or otherwise from the intestate, is to have an equal part in the distribution with the rest of the children, without any consideration of the value of the land which he hath by descent or otherwise from the intestate. § 5.

And in case there be no children, nor any legal representatives of them; then one moiety of the said estate to be allotted to the wife of the intestate, the residue of the said estate to be distributed equally *to every of the next of kindred of the intestate, who are in equal degree,* and those who legally represent them. 22 & 23 *C.* 2. *c.* 10. § 6.

Provided, that *there be no representation admitted among collaterals, after brothers and sisters' children.* § 7. (page 424.)

And in case there be no wife, then all the said estate to be distributed equally to and amongst the children. § 7.

And *in case there be no child, then to the next of kindred in equal degree,* of or unto the intestate, and their legal representatives as aforesaid, and in no other manner whatsoever. *Id.*

Provided also, and be it enacted, to the end that a due regard be had to creditors, *that no such distribution of the goods of any person dying intestate be made, till after one year be fully expired after the intestate's death;* and that such and every one to whom any distribution and share shall be allotted, shall give bond with sufficient sureties in the said courts, that if any debt or debts truly owing by the intestate shall be afterwards sued for and recovered, or otherwise duly made to appear, that then and in every such case he or she shall respectively refund and pay back to the administrator his or her rateable part of that debt or debts, and of the costs of suit and charges of the administrator by reason of such debt, out of the part and share so as aforesaid allotted to him or her, thereby to enable the said administrator to pay and satisfy the said debt or debts, so recovered after the distribution made as aforesaid. § 8.

Provided always, and be it enacted, that in all cases where the ordinary hath used heretofore to grant administration *cum testamento annexo;* he shall continue so to do, and the will of the deceased in such testament expressed shall be performed and observed, in such manner as it should have been if this act had never been made. § 9.

And by the 29 *C.* 2. *c.* 3. § 25. for explaining the said statute, it is declared, that nothing therein shall extend to the estates of feme coverts that shall die intestate, but that their *husbands may demand and have administration* of their rights, credits, and other personal estates, and recover and enjoy the same, as they might have done before the making of the said act.

And by the 1 *J.* 2. *c.* 17. If after the death of a father any of his children *shall die intestate without wife or children, in the lifetime of the mother; every brother and sister,* and the representa-
[395] tives of them, shall have an equal share with her, any thing in the said act to the contrary notwithstanding.

Enabled to proceed to call administrators to account] At common law, no person at all had a right to administer, but it was in the breast of the ordinary to grant it to whom he pleased, till

the statute of the 21 *H.* 8. was made, which gave it to the next of kin; and if there were persons of equal kin, whichever took out administration was entitled to the surplus. And for this reason, this statute of the 22 & 23 *C.* 2. was made, in order to prevent this injustice, and to oblige the administrator to distribute. 1 *Atk.* 459.

Of any person dying intestate] *T.* 8 *W. Petit* and *Smith.* Prohibition was granted to the delegates, to stay a suit there, because they compelled an executor to make distribution of the surplus, he having 50*l.* devised to him as a legacy; because, there being a will and an executor, the spiritual court cannot compel distribution, but only where the party dies intestate. *L. Raym.* 86.

[The spiritual court (1) cannot compel distribution of the residue where there is a will.]

And in the case of *The King* and *Sir Richard Raynes*, *M.* 10 *W.* If an executor be sued in the ecclesiastical court to make distribution, he not being residuary legatee; though that were allowed by the canon law, yet the king's bench would grant a prohibition to stay any such suit; for all suits for distributions were prohibited by the king's bench, until the statute of the 22 & 23 *C.* 2. *c.* 10. made them lawful; and they are only lawful so far as is warranted by that statute, which is only in cases of persons dying intestate. *L. Raym.* 363.

E. 3 *G.* 2. *Hatton* and *Hatton. Strange* moved for a prohibition to the prerogative court, in a suit there instituted by the next of kin against the executor, to make distribution of the surplus, there being a specific legacy to the executor; for that although there have been variety of decisions upon this point in courts of equity, where they have sometimes held the executor to be a trustee for the next of kin as to the surplus, yet there was no instance of the spiritual court's judging of a trust, or setting up any interest contrary to the common law. He insisted, that in the case of a will the judge below is *functus officio*, when he hath granted probate, as to all purposes but calling for an inventory according to the statute of the 21 *H.* 8. *c.* 5. And he cited the case of *Petit* and *Smith*, as reported in the 5 *Mod.* 247., where the testator gave 50*l.* to the executor, and the daughter cited him to make distribution, and a prohibition was granted. And in a report of the same case in *Comb.* 378, it is said by *Holt* chief [396] justice, they never pretended to distribution in the case of an ex-

(1) Bill for distribution is proper in equity. *Howard* v. *Howard*, 1 *Vern.* 314. Thus an estate *pur auter vie* is distributable in equity, though not in the spiritual court. *Witter* v. *Witter*, 3 *P. W.* 102., and *Duke of Devonshire* v. *Atkins*, 2 *P. W.* 382.; but more particularly the statute 14 *G.* 2. *c.* 20., whereby an estate *pur auter vie* being undevised, or in part applied to the payment of debts, according to the *statute of frauds*, shall be distributed in the same manner as personal estate.

ecutor; and they only do it in the case of an administrator by virtue of the statute; and he denied the notion in 2 *Inst.* 33, that executors must divide. Dr. *Sayer* on the contrary endeavoured to maintain, that the spiritual court had concurrent jurisdiction with the court of chancery in this case, as well as in legacies; and insisted that this is a partial intestacy, as to the surplus. But the court was clearly of opinion, that the spiritual court could not intermeddle; and said, that in case of an intestacy, they used to be prohibited, as in *Carter*, 125; 1 *Lev.* 233. and that the statute of distribution enlarged, and not barely confirmed their power, as appears by the history of that statute in *Raym.* 496, &c. And the rule for a prohibition was made absolute. And the court offered, that if the common lawyers on the doctor's side, who were Reeve, Lee, and Fazakerley, would say that they thought there was any thing in it, the plaintiff should declare in prohibition; but they declined it. *Str.* 865.

[Nor order the testator's goods to be brought in.]

To order and make just and equal distribution] *T.* 10 *W. Clerke* and *Clerke.* Clerke died intestate. His wife took out letters of administration to him. Clerke, brother to the intestate, cited the defendant into the spiritual court, to make distribution of the intestate's estate. The defendant there suggests, that the brother hath goods of the intestate in his hands to the value of 200*l.* And upon this the spiritual court orders him to bring the 200*l.* into court, to the end it may be distributed. And for not bringing it in they excommunicate him. Upon which he moves in the king's bench for a prohibition; and it was granted as to the whole process that compelled him to bring in the 200*l.* For by the court; the spiritual court hath power to make distribution of the estate, when it is come in, but not to fetch it in; because that is to hold plea of debt: but the spiritual court might refuse in this case to proceed to the distribution, until the brother had brought in the 200*l.*; but they cannot excommunicate him for not bringing it in. *L. Raym.* 585.

Distribution] Where there is only *one* person that can take, the statute vests the right in that person; although in such case it is not strictly and literally a distribution. 3 *P. Will.* 50. (2)

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(2) A. died intestate, leaving one child; the whole personal estate shall go to him within the statute of distributions. *Palmer* v. *Garrard*, *H.* 1690. *Pre. Ch.* 21.

[Distribution of personalty by law of place of domicil.]

The personal estate of an intestate, wherever situated, must be distributed by the law of the country where his domicil was, (*Bempde* v. *Johnstone*, 3 *Ves.* 198.) for it is supposed to follow his person. *Pipon* v. *Pipon*, 1743. *Ridgw. Ca. t. Hardw.* 172. And for that purpose there can be but one domicil, and the *lex loci rei sitæ* does not prevail. The mere place of birth or death does not constitute the domicil. The original domicil of a man, which arises from his birth and connections, remains until clearly abandoned, and another taken *Somerville*

Shall not any ways prejudice or hinder the customs observed within the city of London, *or within the province of* York *or other places*] Which customs will be considered in their order afterwards. (*Pages* 434 and 452.) [397]

One third part of the said surplusage to the wife of the intestate] And this, it is said, although she be a papist. For in the case of dying intestate, it is the act of the law. It is the legislature that gives these distributive shares to the widow and next of kin. It is a succession *ab intestato* to a personal estate, similar to a descent of land, where an heir, though a papist, if above the age of 18 years and six months may inherit. *T.* 1730. *Davers and Dewes,* 3 *P. Will.* 48.

By the same reason, it should seem, that a papist is capable of taking as tenant by the curtesy, or tenant in dower. *Ibid.* 49. in a note by the editor.

Garthshore v. *Chalie.* By indentures previous to marriage, John Chalie covenanted in the event of his death, leaving his wife surviving and children, that his heirs, executors, &c. should within six months after his decease convey, pay, and assign one full and clear moiety of all such real and personal estate as he shall be seised and possessed of or entitled to at his decease, unto and for the proper use and benefit of his wife, her heirs, executors, &c. Upon the principle of part-performance it was held that the widow was not entitled, in addition to the moiety under the covenant, to a third of the residue of the personal estate by the intestacy of her husband. 10 *Ves.* 1.

The residue—to and amongst the children] An infant *in ventre sa mere,* at the time of the death of the father, was held clearly, by the lord chancellor, to be intitled to a share by the statute of distribution; for he is, in the eye of the law, a child, and ought to be provided for as well as the rest. *M.* 1698. *Ball* and *Smith,* 2 *Freem.* 230.

Other than such child or children, not being heir at law] Although by this statute the heir at law shall not abate in respect of the land which he hath by descent or otherwise from the intestate; yet if he hath had any advancement from his father in his lifetime, otherwise than by land as aforesaid, he shall abate for the same, in like manner as the other children. (3)

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v. *L. Somerville,* 5 *Ves.* 750. A. died intestate at Jersey, and at his death, 500*l.* was due to him on bond, in London, held to be distributable according to the laws of Jersey. *Pipon* v. *Pipon,* 1743. *Ambl.* 23. So if an English subject resides and dies in England, leaving debts, &c. due in Scotland, and administration is granted to him in England, they are distributable as the rest of his personal estate. *Thome* v. *Watkins,* 2 *Ves.* 35.

(3) See *Kirkcudbright* v. *Kirkcudbright,* 8 *Ves.* 51. Money laid out by intestate in repairing houses, which descended to his son and

[Hotchpot or *collatio bonorum.*] (4) In like manner it seemeth that *coheiresses* shall bring together into hotchpot such advancement (not being lands) as they shall respectively have received from their father, before they shall be intitled to receive their several distributive shares; agreeably to the general purport of the act, which is, evidently, to promote an equality as much as may be.

Note, *Littleton* saith (1 *Inst.* 176.) that *hotchpot* signifieth a pudding; unto which his learned commentator assenteth: but this doth not explain to us the meaning of the word, but carries us further from it; for it doth not import that kind of food in general, but metaphorically such only as is compounded of divers ingredients. *Hotch* is a Saxon word, not yet altogether out of use, and signifieth to *shake;* and *pot* is a word well known. And the compound *hotch-pot* is nothing but shaking things together in an urn or other vessel; and is easily transferred to a commixture of the children's portions. And this is what by the civilians is called *collatio bonorum.*

[398] *Heir at law*] *E.* 5. *G.* 2. (1732) *Pratt* and *Pratt* at the rolls. Lord chief justice Pratt died seised of borough English lands, leaving several children. And having made no will, it became a point upon the statute of distribution, whether the youngest son (to whom the lands descended by the custom of borough English) should abate for these lands, or should be considered as an heir at law, who by the statute is to have a distributive share without any allowance for lands by descent. And it was ruled by sir *Joseph Jekyll*, master of the rolls, that he should allow for these lands. For he said, the statute only intended to provide for the heir of the family, who is the common law heir, and not for one who is only heir by custom in some particular places. *Str.* 935. (5)

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heir, is not an advancement to be brought into hotchpot, under the statute: but *secus* if the houses had been given to the son in the father's lifetime. *Smith* v. *Smith*, *H.* 1800. 5 *Ves.* 721.

(4) The provision in the statute of distributions for bringing advances by way of settlement into hotchpot applies only to actual intestacy, not where there is an executor, and consequently a complete will, though the executor may be declared a trustee for the next of kin, who then takes as if the residue had been actually given to them. *Walton* v. *Walton*, (*M.* 1807.) 14 *Ves.* 324.

(5) " *Heir at law*," in the statute 22 & 23 *Car.* 2. *c.* 10., is to be considered and understood κατ' ἐξοχήν. It being objected, that by the words of the statute, *viz.*, *other than such child or children not being heir at law*, it is plain there may be children which may be deemed heir at law besides the eldest son: held that these words there mean, " other than such younger child or children," for *exceptio probat regulam.* The M. R. also thought this a settlement by testator, and decreed he should be brought into hotchpot according to the statute, S. C. *Kelynge. Rep.* 36.

But in the case of *Lutwyche* and *Lutwyche, E.* 1733. Thomas Lutwyche, esquire, died intestate, possessed of a personal estate, and seised of a copyhold in fee, at Turnham Green, which was in the nature of borough English. The question was, whether the youngest son, upon whom the copyhold descended, should have an equal share with the other children of the personal estate, exclusive of the copyhold, or only so much as with that copyhold would make his portion equal to that of the other children. By *Talbot* lord chancellor: The heir at law is the eldest son, and not the heir in borough English; and the exception in the statute extends only to the eldest son. Yet nevertheless the youngest son, who is heir in borough English, shall not bring the borough English estate into hotchpot. There is no law to oblige him to do this, but only this statute; and there are no words in the statute that require it; for the statute speaketh only of such estate as a child hath by settlement, or by the advancement of the intestate in his lifetime. And it was decreed, that the youngest son should have an equal share with the other children, without regard to the value of the borough English estate.

And the case of *Pratt* and *Pratt* came after this case before the lord chancellor Talbot; and he reversed the decree of the master of the rolls, and decreed agreeable to this case. *Cas. Talb.* 276.

Who shall have any estate by the settlement of the intestate, or shall be advanced by the intestate in his lifetime] It hath been determined, that small inconsiderable sums, occasionally given to a child, cannot be deemed an advancement, or part thereof. Thus maintenance money, or allowance made by the father to his son at the university, or in travelling, or the like, is not to be [399] taken as any part of his advancement; this being only his education: and it would create charge and uncertainty, to inquire minutely into such matters. So, putting out a child apprentice, is no part of his advancement; for it is only procuring the master to keep him for seven years instead of the parent. *Hender* and *Rose*, at the Rolls, *T.* 1718. But the father's buying an office for the son, though but at will, as a gentleman pensioner's place, or a commission in the army, these are advancements *pro tanto*. *Norton* and *Norton, M.* 1692. By the lords commissioners, *Rawlinson* and *Hutchins*. 3 *P. Will.* 317. (6)

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(6) *Lord Kirkcudbright* v. *Lady Kirkcudbright*. 8 *Ves.* 51. A gold watch and wedding clothes are no advancement of a child. *Elliott* v. *Collier, T.* 1747. 3 *Atk.* 526. See *Morris* v. *Burrough*, 1 *Atk.* 403. 3 *P. Wms.* 317. *n.* An advancement must be by way of portion in marriage, or to set up in the world, and not things given by way of emolument, S. C., and see *Hearne* v. *Barber*, 3 *Atk.* 213. *Hume* v. *Edwards, id.* 450., S. P. Alimony advanced by a father to a child is no advancement, S. C. *Edwards* v. *Freeman, infra*, 399.

Also a provision made by a *marriage settlement*, although it is in the nature of a purchase, yet is such an advancement, as that a child claiming a distributive share shall first bring the said advancement into hotchpot. As in the case of *Phyney* and *Phyney*, *H.* 1708. The father, on his son's marriage, covenanted, in case of a second marriage, to pay to the first son by the first wife 500*l.* There was a son, and several other children of the first marriage. The father of these children died intestate. By the court: The heir must bring the 500*l.* into hotchpot, although in nature of a purchaser under a marriage settlement. 2 *Vern.* 638.

So in the case of *Edwards and Freeman*, *M.* 1727. Before King lord chancellor, assisted by Raymond chief justice, and the master of the rolls, and Price and Fortescue justices. Mr. Freeman, on his marriage, entered into articles, in consideration of the said marriage, and of 4000*l.* portion, to settle an estate to raise portions for daughters, in case there were no sons; that is to say, if but one daughter the sum of 5000*l.*, if two or more, then the sum of 6000*l.* equally amongst them, to be paid at their respective ages of 18 years, or days of marriage, which should first happen: and 80*l.* a year maintenance in the mean time to each daughter. The marriage took effect; and they had issue one daughter only, and no son. Then the wife dies. Afterwards Mr. Freeman married a second wife; and had by her a son and a daughter; and died intestate, leaving a personal estate to the amount of 20,000*l.* The daughter by his first wife at that time was about 12 years of age; and some time after, married the plaintiff Mr. Edwards: And they brought their bill, to have an account of the personal estate of Mr. Freeman, and their distributory share thereof. And the only question was, whether
[400] this 5000*l.* should not be looked upon to be so far in advancement of the plaintiff, the wife of Mr. Edwards, that if she would have any farther share of her father's personal estate, they must bring this 5000*l.* into hotchpot.—For the plaintiffs it was argued, that they were entitled to a distributory share, without regard to this 5000*l.* which was no advancement, either within the words or meaning of the act, which intended only an advancement of children after they are in being, and when they are about being married or disposed of in the world; but this, if any, was an advancement long before the plaintiff was born, and when it was wholly unknown and uncertain whether there ever would be such a daughter: That it was likewise contingent and uncertain, after she was born, whether she would ever be intitled to this fortune or not; for if she had died before 18, or marriage, it would have sunk into the inheritance for the benefit of the heir: and she was but 12 years of age at the time of her father's death, and therefore might have died before she was intitled to this 5000*l.*: That the statute must operate, either at the time of the father's death,

or within a year after at furthest; but in this case the plaintiff was not intitled to her 5000*l.*, either in her father's lifetime, or within a year after; and the distribution was not to wait till it should appear whether she would attain 18 or be married: That this 5000*l.* was not a voluntary provision moving from the father, but the plaintiff was a purchaser thereof, in consideration of her mother's portion; and suppose a child had money of his own, and agreed with his father, in consideration thereof, to have a portion from his father after his death; or if a collateral relation had purchased such a portion from the father for his child, certainly this would not be an advancement: and the intent of the statute was, to make them all equal out of the father's personal estate, not out of what was purchased for them by others, or by the mother, as in this case. — On the other side, it was argued for the defendants, that the 5000*l.* thus provided for by the settlement, was an advancement within the meaning of the statute: which appears throughout to intend and preserve an equality between the children: That the statute makes no distinction, whether it was a voluntary provision of the father, or arose from the contract of the parties; and a child provided for either way, is provided for: and it is not like the cases put, where a child, either with his own or a relation's money, purchases an estate, or a sum of money from the father, but a direct sale, as much as it would have been to any stranger: That this portion, though not [401]
payable till after the father's death, was nevertheless a provision for her by him, in his lifetime, as the act speaks; as the principal part of it, to wit, the security, was executed by him in his lifetime; and as he was not at liberty to controul it; and suppose he had given such a portion payable at his death, this would certainly have been a good provision within the statute; and here the portion is payable as soon as possibly it can be wanted, namely, at 18 or marriage, and a maintenance of 80*l.* a year in the mean time; and though it is true, that a portion out of lands sinks in the inheritance, if the party dies before it becomes payable, which if it were a personal estate it would not, yet that is not material here, since the statute makes no distinction whether the portion is payable out of the real or personal estate: That if a bill had been brought immediately after the father's death, for a distribution, there could be no inconvenience in setting apart a sum to answer the contingency, when it should happen, no more than in the case of debts, which is every day done; and there are some whose estates are not got in till several years after their deaths, and a distribution may very properly be made thereof from time to time as they come in. — And the court were all clear of opinion, that this was an advancement by the father in his lifetime, within the meaning of the statute, though contingent and future, so that she could not have that and her distributory share likewise. And the master of the rolls said, that the civil law made

no difference between a real and personal estate, but only moveable and immoveable: and the words of the act, which speak of a provision made by the father in his lifetime, are very proper to distinguish between that and a provision made by his will. And the chief justice said, suppose the father had left but 2000*l.* personal estate, it would be extremely hard, that the eldest daughter should have her 5000*l.* and a share of the 2000*l.* also. And the lord chancellor said, he thought any settlement in or out of lands, either by annuity, rent, or portion, would be a provision within the statute; and that such provision might be valued and brought into the *collatio bonorum*, if they think it worth their while; that the 5000*l.*, whether called contingent or not, is an interest, and such a one as would happen within a reasonable time, to wit, six or seven years after the father's death; that the distribution
[402] must be made as the estate stands at the father's death, and the parties are to give bond to refund, if debts afterwards appear; and future debts due to the intestate must be distributed as they can be got in; that here the contingency has happened, and she is now at liberty to say, whether she will stick to that provision, or bring it into the computation of *collatio bonorum*, in order to have an equal share with the rest. But as to the 80*l.* a year maintenance, that is not to be brought in, being only for the education and maintenance of the daughter, which the parents were best judges of. — And accordingly the decree was pronounced. 1 *Abr. Eq. Cas.* 249. *pl.* 10. [S. C. 2 *P. Wms.* 435.]

So in the case *Lloyd* and *Twitsham*, H. 1715; the lord chancellor *Cowper* was of opinion, that the word *portion* in the statute, with respect to younger children, includes an estate in *land* as well as in money; and that this land, in the computation of the estate to be distributed, is to be added to and computed with the other parts of it (7): but with respect to the eldest son, what-

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(7) Land claimed by settlement has been thus held a portion under the statute of distributions; but there does not appear any case where land taken by descent has been held a portion, neither that any provision *by will*, either of land or money, has been within the statute considered a portion advanced in the life: the statute means by *intestate*, not a person making no will, but a person dying intestate as to the subject to be distributed by the statute. There is no instance of real estate given to a younger child, or a particular part of the personal estate given to any child by testator, and where executors have been held trustees of the residue, which therefore, as undisposed of, was to go under the statute, where, in the division of that residue, the court of chancery ever brought into hotchpot what the particular child took under the will of that person dying partly testate and partly intestate. All the cases put it on this: admitting that property, which cannot be taken till after the decease of the party, shall be an advancement, yet it is an advancement made in the life of the intestate, which are the very words of the statute, "advanced in his lifetime." *Twisden* v. *Twisden*, *E.* 1801. 9 *Ves.* 425.

ever land came to him from his father, by descent, or otherwise; he is to have his share, without any consideration of the value of such land. *Viner*, Executors, (Z. 10.) 3.

So if the father settles a *rent* out of his lands upon a younger child, this is an advancement. 2 *P. Will.* 441.

Likewise if the father by deed settles an *annuity* upon a child, to commence after his death; this is an advancement *pro tanto:* and by the same reason, a *reversion* settled on a child, as it may be valued, is an advancement also. 2 *P. Will.* 442.

Lord Kirkcudbright secured by bond to his eldest son an annuity, and afterwards died, the payments having been made till that event took place. It was held that the annuity was an advancement to be brought into hotchpot, [*viz.* the value at the date of the grant: or, if it has ceased, the payments received at the option of the child. A widow has no claim whatever on what is brought into hotchpot among the children. *Kirkcudbright* v. *Kirkcudbright*, 8 *Ves.* 51. *Cleaver* v. *Spurling*, 2 *P. Wms.* 528.] 8 *Ves.* 51.

But whatever a child receives out of the *mother*'s estate, it is said, shall not be brought into hotchpot. As in the case of *Holt* and *Frederick*, *T.* 1726. A man married, and had three children, two sons and a daughter. His wife survived him; and having, out of her own estate, given 1000*l.* to her daughter in marriage, died intestate, leaving those three children. The question was, whether the daughter, who had received this 1000*l.* ought to bring it into hotchpot, before she should receive any further share of her mother's personal estate. The lord chancellor *King* said, it weighed with him, that the act of distribution was grounded upon the custom of London, which never affected a *widow*'s personal estate; and that the act seems to include those within the clause of hotchpot who are capable of having a wife as well as children, which must be husbands only. And so in this case (though without much debate) his lordship [403] ruled, that the daughter should not bring the 1000*l.* which she had received in her mother's lifetime into hotchpot. 2 *P. Wms.* 356. [See *Edwards* v. *Freeman*, 2 *P. Wms.* 435.]

And if a child who has received any advancement from his father shall die in his father's lifetime, leaving children; such children shall not be admitted to their father's distributive share, without bringing their father's advancement into hotchpot: as in the case of *Proud* and *Turner*, *M.* 1729. A father had several children, and in his lifetime advanced in part one of them. The child thus advanced in part died in his father's lifetime, leaving issue. Afterwards the father died intestate, possessed of a considerable personal estate. It was ruled, that the issue of the dead child must bring into hotchpot what their father received in part of advancement, as he, if living, must

have done; in regard the issue stands in the place and stead of the father, claims under him, and cannot be in a better condition than the father, if living, would have been, and had claimed his distributive share. 2 *P. Will.* 560.

And the reason is, because such children do not take in their own right, but as representing their father deceased. — But whether those grandchildren, having been advanced some more, some less by their father in his lifetime, shall bring their several advancements into hotchpot one with the other, before they shall distribute their deceased father's share of their grandfather's personal estate, doth not appear to have been determined. If their father also died intestate, then it seemeth that they shall be required to bring into hotchpot; for in such case they take, not from their grandfather, but from their father: and this brings it within the general rule aforegoing.

But where there are only grandchildren, their fathers or mothers respectively having died in the lifetime of their grandfather; in such case they take in their own right, and not by representation of their father or mother deceased. Whether these also shall bring into hotchpot, either altogether, or those descended from the same stock amongst themselves respectively, may upon the like grounds be matter of doubt. But it seemeth that this case is farther off from the rule than the former; for here they do not take by representation, but each in his own right. And the statute doth not seem to require that the *collatio bonorum* shall extend further than to children, or the *re-*
[404] *presentatives* of such children: in like manner as the custom of London doth not extend to grandchildren (as will appear afterwards); so neither doth the custom of the province of York.

A doubt likewise may arise, and the solution thereof will be the same, where a grandchild hath received some advancement, not from his father, but from his grandfather; whether or no such grandchild shall bring his said advancement into hotchpot with the brothers and sisters of his father deceased. The grandchild in this case taketh not in his own right, but as representative of his father; and therefore, as it seemeth, should not bring his own portion, but only his father's portion, into hotchpot. — But concerning these points, no adjudication hath occurred. (*m*)

(*m*) This question is discussed by *Vinnius*, in his tract *de Collationibus*, *c.* 12. where he quotes the opinion of some civilians, that if a grandfather leave a son and daughter, and grandchildren by a deceased daughter, which grandchildren had received advancement from their grandfather in his lifetime, they shall collate their advancements one with another, but not with their uncle and aunt, but he himself is of opinion that they shall collate with the brother and sister of their deceased mother.

By portion not equal to the share which would be due to the other children] A child partly advanced shall bring in its advancement only amongst the other children; but the wife shall have no advantage of it. *H.* 1701. *Ward* and *Lant. Prec. Cha.* 182. 184. 8 *Ves.* 51.

To every of the next of kindred to the intestate, who are in equal degree] Here it is very material to inquire, who are these *next of kindred in equal degree.* For the perfect understanding whereof, it is to be observed, that kindred are distinguished either by the *right* line, or by the *collateral.* The *right* line is of parents and children, computing by *ascendents* and *descendents;* the *collateral* line is between brothers and sisters, and the rest of the kindred among themselves. *Ayl. Par.* 327.

And forasmuch as proximity between two persons proceeds either from this, that they are descended one from the other (which makes the connexion between ascendents and descendents), or from their being both descended of one and the same person (which makes that of collaterals); we judge therefore of the proximity between two persons, by the number of generations which make both the one and the other of the said connexions. And these generations are called *degrees,* by which we step from one person to another, in order to make the computation of their kindred, in the manner hereafter explained. [405] 1 *Strahan's Dom.* 631.

Those of the right line are reckoned upwards, as parents; or downwards, as children: those of the collateral line are reckoned *ex transverso,* or side ways, as brothers and sisters, uncles and aunts, and such as are born from them. *Ayl. Par.* 327.

And there is no difference between the *civil* and *canon* law in the ascending and descending line; but every generation, whether ascending or descending, constitutes a different degree. Thus the father of John is related to him in the first degree, and so likewise is his son; his grandfather and grandson in the second; his great grandfather and great grandson in the third. This is the only natural way of reckoning the degrees in the direct line, and therefore universally obtains, as well in the *civil* and *canon,* as in the *common* law. *Blackst. Descents,* 8.

But there is a difference in reckoning the *collateral* line. Thus, if we would know in what degree of collateral kindred two persons stand according to the *civil law,* we must begin our reckoning from the one of them, by ascending to the person from whom both are branched, and then by descending to the other to whom we do count, and it will appear in what degree they are. For example:— In brother's and sister's sons; take one of them and ascend to his father, there is one degree; from the father to the grandfather, that is the second degree; then descend from the grandfather to his son, that is the third de-

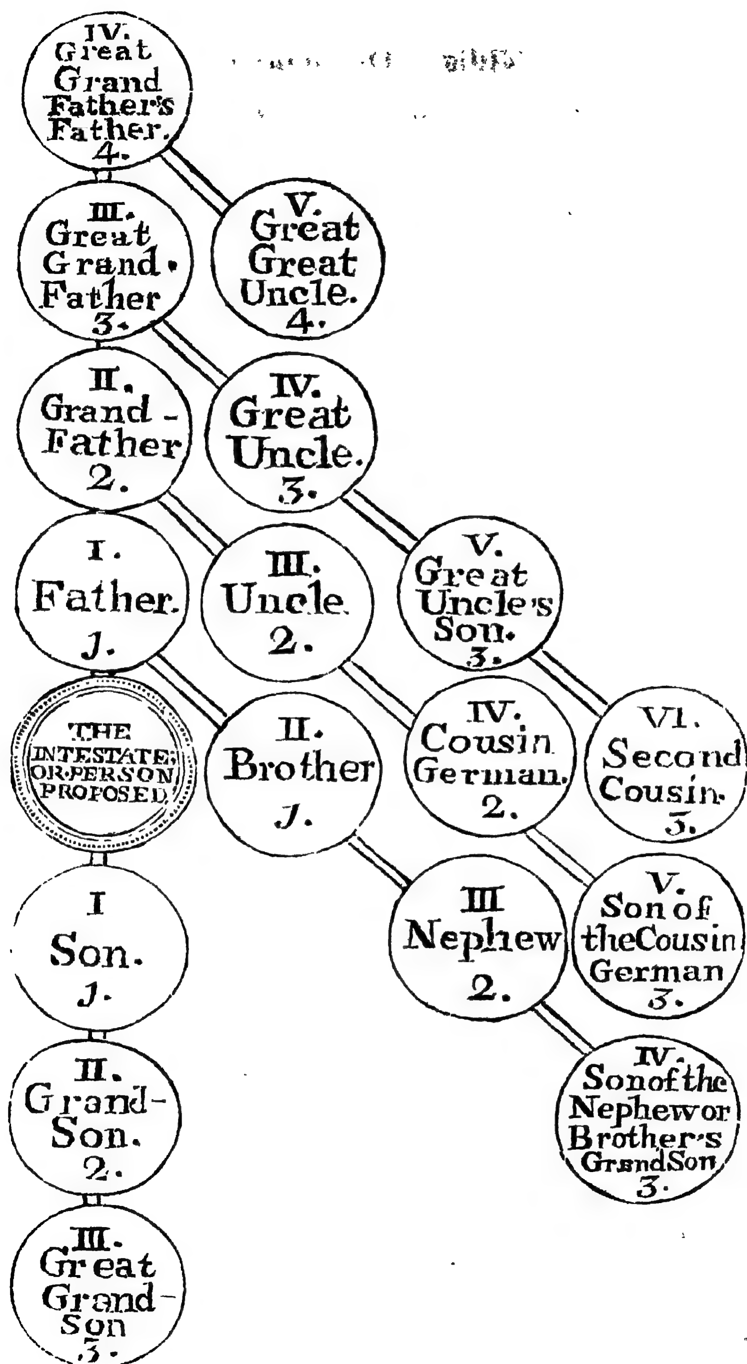
gree; then from his son to his son, that is the fourth degree. 1 *Inst.* 23.

But by the *canon* law, there is another computation. For the canonists do ever begin from the stock, namely, from the person of whom they do descend, of whose distance the question is. For example, if the question be, In what degree the sons of the two brothers stand by the canon law, we must begin from the grandfather, and descend to one son, that is one degree; then descend to his son, that is another degree; then descend again from the grandfather to his other son, that is one degree; then descend to his son, that is a second degree. So in what degree either of them are distant from the common stock, in the same degree they are distant between themselves. And if they be not equally distant, then we must observe another rule, viz. in what degree the most remote is distant from the
[406] common stock, in the same degree they are distant between themselves; and so the most remote makes the degree. 1 *Inst.* 24.

Collateral kinsmen agree with the lineal in this, that they descend from the same stock or ancestor; but they differ in this, that they do not descend from each other. Collateral kinsmen then are such as lineally spring from one and the same ancestor, who is the *stirps*, root, or common stock, from whence these relations are branched out. As if John has two sons, who have each a numerous issue; both these issues are lineally descended from John as their common ancestor; and they are collateral kinsmen to each other, because they are all descended from this common ancestor, and all have a portion of his blood in their veins, which denominates them *consanguinei*. *Blackst. Desc.* 9, 10.

And the very being of collateral consanguinity consists in this descent from one and the same common ancestor. Thus John and his brother are related: why? because both are derived from one father: John and his first cousin are related; why? because both descend from the same grandfather: and his second cousin's claim to consanguinity is this, that they both are derived from one and the same greatgrandfather. In short, as many ancestors as a man hath, so many common stocks he hath, from which collateral kinsmen may be derived. And as we are taught by holy writ, that there is one couple of ancestors belonging to us all, from whom the whole race of mankind is descended; the obvious and undeniable consequence is, that all men are in some degree related to each other. *Id.* 10, 11.

The different manner of calculating the degrees, may perhaps be better apprehended by the following table: wherein it is to be observed, that the numeral roman letters at the top express the degrees by the *civil* law, and the figures at the bottom express the degrees by the *canon* law.


IV. Great Grand Father's Father. 4.
III. Great Grand Father 3.
V. Great Great Uncle. 4.
II. Grand-Father 2.
IV. Great Uncle. 3.
I. Father. 1.
III. Uncle 2.
V. Great Uncle's Son. 3.
THE INTESTATE; OR PERSON PROPOSED
II. Brother 1.
IV. Cousin German. 2.
VI. Second Cousin. 3.
I Son. 1.
III Nephew 2.
V. Son of the Cousin German 3.
II. Grand-Son. 2.
IV. Son of the Nephew or Brother's Grand Son 3.
III. Great Grand Son 3.

And here it is evident, that the degrees in the *descending* and *ascending* lines are by both laws the same. Thus the son is in the first degree, the grandson in the second, and the greatgrandson in the third, by both laws, in the *descending* line. So the father is in the first degree, the grandfather in the second, and the greatgrandfather in the third, and so on, by both laws, in the *ascending* line.

But in the *collateral* line the calculation is different.

Thus the cousin german is in the fourth degree by the civil law, and in the second degree by the canon law. For by the civil law, we ascend first to the father, which is one degree; from him to the common ancestor the grandfather, which is the second degree; from the grandfather we descend to the uncle, which is the third degree; and from the uncle to the cousin german, which is the fourth degree. But by the canon law, we begin at the common ancestor, the grandfather, and reckon downwards from him to the father, which is one degree; from the father to the intestate is the second degree: so, on the other side, from the grandfather to the uncle is the first degree; and from the uncle to the cousin german is the second degree: and by what degree they are distant from the common ancestor, by the same degree they are distant from each other, that is, in the second canonical degree. —— So in reckoning to the son of the nephew, or brother's grandson: by the civil law we ascend to the father, which is one degree; from the father we descend to the brother, which is the second degree; from the brother to the nephew, which is the third degree; and from the nephew to the son of the nephew, which is the fourth degree. But by the canon law we begin at the common ancestor, the father, and reckon down from him to the intestate, which is one degree: then on the other side, from the same common ancestor the father to the brother is one degree; from the brother to the nephew is the second degree; and from the nephew to the son of the nephew is the third degree: and by the rule before laid down, in what degree the further of them is distant from the common ancestor, in the same degree they are distant from each other; so that here the intestate and the son of his nephew, or brother's grandson, are distant by the canon law in the third degree of kindred.

[Reason for the different methods of computing the collateral degrees of consanguinity by the civil and canon laws.]

And the reason of the different methods of computing the degrees of consanguinity in the collateral line, between the civil law on the one hand, and the canon law on the other, seemeth to be this: the civil law regards consanguinity principally with respect to successions, and therein very naturally considers only the person deceased, to whom the relation is claimed; it therefore counts the degrees of kindred according to the number of persons through whom the claim must be derived from him, and makes not only the son of his nephew, but also his cousin ger-

man, to be both related to him in the fourth degree, because there are three persons between him and each of them. The canon law regards consanguinity principally with a view to prevent incestuous marriages, between those who have a large portion of the same blood running in their respective veins; and therefore looks up to the author of that blood, or the common ancestor, reckoning the degrees from him: so that the son of the nephew is related in the third canonical degree to the person proposed, and the cousin german in the second; the former being distant three degrees from the common ancestor, and therefore deriving only one-fourth of his blood from the same fountain with the person proposed; the latter, and also the person proposed being each of them distant only two degrees from the common ancestor, and therefore having one half of each of their bloods the same. *Blackst. Desc.* 41, 42.

For persons descended from one common ancestor, in the first degree, have the whole blood of their said common ancestor; in the second degree, they have but half the blood of the said common ancestor; in the third degree, they have but half of that half, that is, one-fourth; in the fourth degree, only half of that fourth, that is, one-eighth; in the fifth degree, one-sixteenth; and so on *in infinitum.*

The common law regards consanguinity principally with respect to descents; and having therein the same object in view as the civil, it may seem as if it ought to proceed according to the civil computation. But as it also respects the purchasing ancestor, from whom the estate was derived, it therein resembles the canon law, and therefore counts its degrees in the same manner. (8) Indeed the designation of person, in seeking for the *next of kin,* will come to exactly the same end (though the degrees will be differently numbered) whichever method of computation we suppose the law of England to use; since the right of representation in the descent of real estates (of the father by the son, and so on) is allowed to prevail *in infinitum.* This allowance was absolutely necessary, else there would have frequently been many claimants in exactly the same degrees of [410]
kindred, as (for instance) uncles and nephews of the deceased; which multiplicity, though no inconvenience in the Roman law of partible inheritances, yet would have been productive of endless confusion, where the right of sole succession, as with us, is established. The issue or descendents therefore of the brother of John, are all of them in the first degree of kindred, with respect to inheritances, as their father when living was: those

(8) But see even as to calculating descents of real estates. 2 *Bla. Com.* 207. *n.* (4) 227. *n.* (12) by *Christian.*

of his uncle in the second; and so on; and are called to the succession in right of such their representative proximity.

The right of representation being thus established, the rule with regard to the descent of real estates amounts to this; that, on failure of issue of the person last seised, the inheritance shall descend to the issue of his next immediate ancestor. Thus if John dies without issue, his estate shall descend to his brother, who is lineally descended from his next immediate ancestor, their father. On failure of brethren, or sisters, and their issue, it shall descend to the uncle of John, the lineal descendent of their common ancestor, the grandfather; and so on. *Blackst. Desc.* 41, 42.

But this representation *in infinitum* amongst collaterals, is not admitted in the succession to personal estate, the same being restrained and limited by the statute (as will appear afterwards).

In the case of *Wingate* and *Fitch, M.* 21 *Ja.* Administration upon the statute of *Hen.* 8. was granted to the brother of the half blood. The brother of the whole blood appealed to the delegates, alleging that he was nearer of kin by the ecclesiastical law; and the delegates inclining to repeal the administration, and to grant it to the brother of the whole blood, a prohibition was granted to try the matter thereupon by the common law; for this being ordained by statute, it was said, that it ought to be interpreted according to the common law. 2 *Roll's Abr.* 303.

And in the case of *Blackborough* and *Davis, E.* 13 *W. Holt* chief justice said, that the construction of the statute of distribution, on the proximity of degrees, must be according to the common law. 12 *Mod.* 616.

But the more modern cases seem to suppose, that the said statute, being made in an ecclesiastical matter, shall be construed according to the rules of the civil law. (9)

Upon which account, the learned Dr. *Harris* observes, that
[411] the three first chapters of the 118th Novel of *Justinian* deserve the reader's attentive consideration; not only because they contain the latest policy of the civil law, in regard to the disposition of intestate's estates; but because they are the foundation of our statute law in this respect. And they are still (he says) almost of continual use, by being the general guide of the courts in England, which hold cognizance of distributions, in all those cases, concerning which our own laws have been either silent, or not sufficiently express. *Har. Justin. ad finem.*

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(9) See *Mentney* v. *Petty*, *T.* 1722. *Prec. Ch.* 594. *Carter* v. *Crawley*, *T. Raym.* 496. 506. *Lloyd* v. *Tench*, 2 *Ves.* 215. *Pett's* case, 1 *P. Wms.* 25. *Bowers*, v. *Littlewood*, *id.* 595. *Thomas* v. *Ketteriche*, 1 *Ves.* 333. *Wallis* v. *Hodson*, 2 *Atk.* 118.

And therefore it is judged requisite to insert the said three chapters here at length, and in the progress to observe what alterations have been made by the statute aforesaid, and by the other laws of this realm, and how far the said Novel with respect to this matter seemeth to be still a rule and direction.

CHAPTER THE FIRST.

Of the succession of DESCENDENTS.

" IF a person dieth intestate, leaving a descendent of either
" sex, or of whatsoever degree; such descendent is to be pre-
" ferred to all ascendents and collaterals. And if any of the
" descendents of the deceased should die, leaving sons or
" daughters, or other descendents, they shall succeed in the
" place of their parent, and shall be entitled to the same share
" of the intestate's estate, which their parent would have had
" if such parent had lived. And this kind of succession is
" termed a succession *in stirpes;* for in the succession of de-
" scendents we allow no priority of degree, but admit the
" grandchildren of any person by a deceased son or daughter
" to be called to inherit that person, together with his sons or
" daughters, without making any distinction between males and
" females, or the descendents of males and females."

And what the civil law distributes in this manner amongst the children and other descendents, the statute clearly enough apportioneth amongst them, taking in together with them the wife of the deceased where there is a wife surviving. And [412] herein the civil, canon, common, and statute laws do all agree, in giving this preference to descendents, exclusive of all ascendents and collaterals.

Only with respect to *grandchildren*, these by the civil law, even when alone, although they descend from various stocks, and are unequal in their numbers, will take the estate of their deceased grandfather *per stirpes*, and not *per capita;* as suppose a man should die, leaving grandchildren by three different sons, already dead, to wit, three by one son, six by another, and twelve by another, each of these classes of grandchildren would take a third of the estate, without any regard to the inequality of the numbers in each class. But as to this point in England, the courts in which distributions are cognizable will order the division of an estate in such case to be made *per capita;* and this, partly from a motive of equity, and partly from a consideration of the intent of the statute, which directs an equal and just distribution: and when the act mentions representation, it must be understood to refer to it, in those cases only, where representation is neces-

sary to prevent exclusion, but not to refer to it in those cases, where all the claimants are in equal degree, and therefore can take each in his own right. *Harr. Just. ad finem.*

And if in the case of the succession of a father, who leaves behind him one or more children, his widow should happen to be big with child, the child in the mother's womb would be reckoned among the children of the deceased. And if the other children should proceed to a partition of the estate, it would be necessary to lay aside one share for the child that is to be born, and to name a curator to it, who may take care of its interest; unless they should think it more convenient to delay the partition unto the birth of the child, either by reason of the uncertainty whether the child will be born alive or not, or because it may happen that there may be more children than one of this birth. 1 *Strah. Dom.* 624.

But this provision is rendered more effectual by the statute aforesaid, which requires that no distribution shall be made till after the expiration of one year from the intestate's death, within which time such child or children will be born.

[413]

CHAPTER THE SECOND.

Of the succession of ASCENDENTS.

" WHEN the deceased leaves no descendents, *if a father or* " *mother, or other ascendent* survive him, we decree, that they " shall be preferred to all collateral relations; except brothers " or sisters, as shall be hereafter more particularly declared. " And *if divers ascendents are living, we prefer those who are in* " *the nearest degree, whether they are male or female, paternal or* " *maternal. And when several ascendents concur in the same de-* " *gree, the inheritance of the deceased must be so divided, that the* " *ascendents on the part of the father may receive one half, and* " *the ascendents on the part of the mother the other half, without* " *regard to the number of persons on either side.* But *if the de-* " *ceased leaves brothers or sisters* of the whole blood, *together with* " *ascendents, these collaterals of the deceased shall be called with* " *the nearest ascendents;* and although the surviving parents are " a father and mother, the inheritance must be so divided ac- " cording to the number of persons, that each of the ascendents, " and each of the brothers and sisters, may have an equal " portion." (*n*)

(*n*) This Novel excludes the children of a deceased brother of the whole blood, when they concur with brothers and sisters and ascendents; but by Novel 127. *c.* 1. they are admitted by representation to take the same share which their father would have taken had he

If a father or mother] By the law of England, when a child dieth intestate, leaving a *father*; the father is solely entitled to the [414] whole personal estate of the intestate, exclusive of all others; and anciently, that is, in the reign of king Henry the first, a surviving *father*, or *mother*, could have taken even the real estate of their deceased child. But this law of succession was altered soon afterwards; for we find by Glanville, that in the time of king Henry the second, a father or mother could not have taken the real estate of their deceased children, the inheritance being then carried over to the collateral line. And it hath ever since been held as an inviolable maxim, that an inheritance cannot ascend. But this alteration in the law, made since the reign of king Henry the first, did not extend to personal estate; so that before the statute of the 1 *Jac.* 2. *c.* 17. if a child had died intestate, without a wife, child, or father, the *mother* would have been entitled to the whole personal estate; but by that statute, every brother and sister, and their representatives, shall have an equal share with her. *Harr. Just. ibid.*

Or other ascendent] Here it is manifest by the civil law, that ascendents, of whatever degree, shall be preferred before all collaterals (except in the case of brothers and sisters as aforesaid). But by *Holt* chief justice, in the case of *Blackborough* and *Davis*, it was holden, that this is altered by the statute; which prefers the next of kin, though collaterals, before one, though lineal, that is more remote. 1 *P. Will.* 51.

In the said case of *Blackborough* and *Davis*, *E.* 13 *W.* Administration being granted to the grandmother, the aunt moved for a mandamus to have it granted to her, urging that the first administration was void, she being nearer in degree. But by *Holt* chief justice: In such case it is not void, but only voidable; and it is a matter properly contestible in the spiritual court. And if they are in equal degree, the spiritual court hath election. And the grandmother is as near as the aunt, because the descent to either would be a mediate descent, the medium of which is the father. But the court thought the advantage on the grandmother's side, in this respect, that she stands in the right line. Afterwards the aunt moved for a mandamus to have *distribution*, being in equal degree. On the contrary, it was argued, that she was not

lived. Both Novels require whole blood only in brothers and sisters of the deceased and their children, when they concur with ascendents, or with a brother and sister of the whole blood; but not in any other degree: and therefore civilians admit brothers and sisters of the half blood to take equally, and an uncle of the half blood to concur with one of the whole, and prefer him to the son of an uncle of the whole blood. *Vinnius ad Inst.* 3. 5. 4. *Huber ib. de Suc. ab Intestato. Sande Decis. lib.* 4. *def.* 2.

entitled to it, being not so near as the grandmother, for the grandmother stands in the place of the mother, and is in the second degree to the intestate; the aunts are the daughters of the grandmother, and the daughters cannot be in equal degree with
[415] their mother. And by *Holt* chief justice: No mandamus ought to be in this case. And he said, as by the common law, father and mother were nearer than brother and sister, so grandfather and grandmother are nearer than uncle and aunt. And the grandmother in this case is the root of the kindred, whereas the aunt is only a branch. 1 *Salk.* 38. 251. *Prec. Cha.* 527. 12 *Mod.* 623. 1 *P. Will.* 51. *Ld. Raym.* 684.

So in the case of *Woodroffe* and *Wickworth*, in the court of chancery, *T.* 1719, it was clearly agreed, that if one dies intestate, leaving a grandmother and uncles and aunts; the grandmother is entitled to the personal estate, in exclusion of the uncles and aunts. *Prec. Cha.* 527.

If divers ascendents are living, we prefer those who are in the nearest degree, whether they are male or female, paternal or maternal] And conformable hereunto are the words of the statute, and in such case the distribution shall be made amongst the next of kindred who are in equal degree. So in the case of *Moor* and *Barkham, May* 13, 1723, where the next of kindred to the intestate were a grandfather by the father's side, and a grandmother by the mother's side; it was decreed, that they shall take in equal moieties, as being in equal degree; for though the grandfather by the father's side may in some respects be more worthy of blood, (as in case of the descent of lands); yet in this respect, dignity of blood is not material. 1 *P. Will.* 53.

And when several ascendents concur in the same degree, the inheritance of the deceased must be so divided, that the ascendents on the part of the father may receive one half, and the ascendents on the part of the mother the other half, without regard to the number of persons on either side] By the custom of France (Mr. *Domat* tells us), in pursuance of the rule *paterna paternis, materna maternis,* the remotest ascendents are preferred to those that are nearer, with respect to the goods descended from their stock. And this, he says, seemeth to be more equitable and natural; and there seemeth even to be something of a hardship in the contrary rule. 1 *Strah. Dom.* 639.

And with us, in respect of the descent of lands, the rule holdeth, that lands which came by the father shall descend to the heirs on the part of the father, and the lands which came by the mother shall descend to the heirs on the part of the mother. But
416 with respect to the distribution of personal estate, the statute requires an equal distribution amongst all such ascendents as are in equal degree.

If the deceased leaves brothers and sisters — together with as-

cendents, these collaterals of the deceased shall be called with the nearest ascendents] If it should here be asked, whether the brother of an intestate would exclude the grandfather by the civil law; the Novel appears at first sight to answer it very fully in the negative, by enacting, that if the deceased leaves brothers and sisters, together with ascendents in the right line, these collaterals shall be called with the nearest ascendents. And the generality of writers have understood this passage, as admitting ascendents and brothers to take jointly: yet a contrary interpretation hath been given by some civilians, and for this, amongst other reasons, that as a benefit is hereby intended to the brothers and sisters, this benefit to them would be so much the less, as the ascendents are farther distant from the person deceased, whereas on the contrary in reason it ought to be so much the more. As for example: suppose there are two brothers, and a father and mother, in this case each brother would receive a fourth part; but if there be no father or mother, it may happen that there shall be four grandfathers and grandmothers, and then each brother would have but a sixth part; so there may be eight great grandfathers and great grandmothers, in which case each brother would receive but a tenth part; and so on.—But this question seems now to be settled in England, in consequence of three determinations; the first of which was given in the exchequer, in the case of *Poole* and *Wilshaw*, *T.* 1708; the second, in the case of *Norbury* and *Vicars*, before *Fortescue*, master of the rolls, *M.* 1749; and the third was delivered by the lord chancellor *Hardwicke*, in the case of *Evelyn* and *Evelyn*, *H.* 1754. (1) *Harr. Justin. ad finem.*

Which case of *Evelyn* and *Evelyn* was this.—By the lord chancellor *Hardwicke:* This case is between the grandfather and the brother of the deceased. It is insisted on the behalf of the grandfather, that he is in equal degree of consanguinity with the brother of the deceased, and intitled to an equal share of his estate under the statute of distribution. The statute says, that the ordinary (in case there shall be no wife, children, or children's children) shall make a just and equal distribution among the next of kindred to the dead person in equal degree, or legally representing their stocks *pro suo cuique jure*, "ac- [417]
"cording to the laws in such cases, and the rules and limit-
"ations hereafter set down." Which limitation is only a particular specification in what cases representation shall be allowed; and there is nothing more expressed in the statute, than that the estate shall be distributed equally to every the next of kin to the intestate, who are in equal degree.

This point has been already twice determined in courts of

(1) 3 *Atk.* 762. *Ambl.* 191.

equity. First, in the case of *Poole* and *Wilshaw;* and afterwards in the case of *Norbury* and *Vicars*.

But it has been insisted on for the grandfather, that both these decrees are erroneous; and that according to the computation of the civil law, the grandfather and brother are in equal degree, and consequently are equally intitled.

And I do agree, that in this case the computation of degrees ought to be according to the rules of the civil law; and that those of the common law are only to be regarded in matrimonial cases. Notwithstanding which I shall adhere to the determination of the case of *Poole* and *Wilshaw*. I have seen the lord chief baron *Ward's*, and Mr. baron *Price's* reports of this case, and also that of Mr. *Dodd* (afterwards chief baron). The last of which, though but short, is the clearest of the three. It was a bill brought by the grandmother, for a share of her grandson's estate equally with his brother. And it was insisted on for her, that she was in equal degree of consanguinity, and equally intitled. But the reporter says, "All the court contrary; and "there has been no such usage since the making of the statute." And I know of none since; though it is eighty-three years since that statute was made. The subsequent decree at the rolls was conformable to this. And therefore I shall not attempt to overthrow these determinations.

But if this was *res integra*, I think there are strong grounds, both from the common and civil law, to prefer the brother to the grandfather. The words in the statute "*pro sui cuique jure*, according to the laws in such cases," refer to certain precedent rules and methods of expounding the law.

The civil law is no part of the laws of England, any further than it has been received here in certain cases. In descent of lands there is but one degree between brother and brother. See lord chief justice *Hale's* argument in the case of *Collingwood* and *Pace*, 1 *Ventr*. 423. who says, that according to the computation of degrees according to the laws of England, brother and
[418] brother makes one degree. And the brother is distant from his brother and sister in the first degree of consanguinity. And he adds, that though the brother is by the civil law in the second degree from the brother, yet they say, in collaterals *nullus est proximior fratre, ideoque in collateralibus nullus est primus gradus, sed secundus obtinet vicem primi*. In the case of *Blackborough* and *Davis*, 1 *P. Will*. 50. the lord chief justice *Holt* delivered the opinion of the court, and said that the laws of England, and not any foreign law, ought to govern in this case; and he cited the Saxon laws and others to the point then in question, which was concerning a personal estate.

What I have said would, I think, alone be sufficient to support the determination in the case of *Poole* and *Wilshaw;* as it

shews, that the construction of the statute ought to be according to the law of England. But I further think, that according to the Roman law alone, there would be sufficient ground to support the resolution. How the matter of succession of collaterals stood upon the law of the twelve tables, and what alteration it received by the constitution of the emperor Claudius, and the *senatus-consultum Tertullanum* made in the time of the emperor Antoninus Pius, the adopted son of Adrian, so as to let in the mother who was before excluded, may be seen at large in *Vinnius's Commentary on the Institutes.** By the text itself of the *Institutes*†, it appears, that the grandmother was not to take as well as the mother. The words are *Postea autem senatus-consulto Tertulliano, quod divi Adriani temporibus factum est, plenissime de tristi successione matris non etiam aviæ deferendum, cautum est.* See *Vinnius*'s comment on this passage, page 543, who shews that it was in the time of Antoninus Pius. But *Heineccius's Syntagma, lib.* iii. *tit.* 3. examines all the arguments, and inclines to Justinian's opinion. By the Code‡, the sister is preferred with the grandmother or grandfather.

But the whole has been altered by the Novels of Justinian.—It has been said, that the Novels were never received in the western empire. But this is not so in the generality in which it was laid down. For they have been received in all countries where the civil law has been received, as much as other parts of that law; which has never, since the declension of the western empire, been taken for the absolute rule of law in any nation. All the commentators of the civil law consider the Novels as [419] part of the Roman law. They call them *jus novissimum. Vinnius*, in his Commentary on the Institutes§, has a dissertation which he calls *ratio succedendi ab intestato ex jure novissimo.* Now by the 118th Novel, the brothers are let in to take an equal share with the father and mother. It is true that Mr. *Domat* is of another opinion.‖ But *Voet* maintains the former opinion with great clearness: *Illud non satis expeditum est,* &c.¶ In this passage Mr. *Voet* shews, that the emperor in the above cited Novel has emphatically said, *fratres et sorores cum proximis gradu ascendentibus vocari;* which mention of the *next in degree* would be entirely superfluous, if it was not intended to denote

(*) *Lib.* iii. *tit.* 2. *par.* 3. (†) *Lib.* iii. *tit.* 3. *par.* 2.
(‡) *Lib.* vi. *tit.* 58. *l.* 9.
(§) 4to edition at Leyden, 1726. *p.* 554.
(‖) Folio edition at Paris, 1713, *vol.* i. *part* 2d. *book* 2d. *tit.* 2d. *sect.* 1. *paragr.* 7th. Or *Strahan*'s Translation, 2d edition, *page* 639.
(¶) *Hague* edition, 1731, *vol.* i. *book* 38. *tit.* 17. *paragr.* 13. *page* 587.

those who are in the first ascending degree (*o*); since it is a certain rule of law, that there is no representation in the ascending line. He afterwards shews what absurdities follow, by letting in remoter persons in the ascending line to share with the brothers; since the more remote they were, the more in number they might be, and consequently would carry away a great share from the brothers, as the estate is to be divided into as many portions as there are persons. He then argues from the words of the Novel, which says, that the brothers shall be called to succeed equally with the ascendents in the next degree. (See the critique on these words, in *Domat* before cited)—*Si* aut *pater aut mater fuerint.* Whence it follows, that they are not to come in promiscuously with all ascendents, but Si *pater aut mater fuerint.* And he gives some additional reasons to support his opinion. *Si* aut *pater*——these are the words of the Novel as cited by *Voet;* but in the Novel itself it is *Si* et
[420] *pater* (ει και πατηρ η μητηρ ειησαν). Upon which Mr. *Domat* argues that the words *si et*, being translated from the Greek, signify *et si.* However Mr. *Voet*'s general reasoning may be preferred to *Domat*'s, it is not fair in him to alter the words of the Novel, on purpose to favour his own interpretation; when he could not but know, that a contrary one has been founded on the words as they stand in the Novel.

The lord chief justice *Hale* in the place above cited (1 *Ventr.* 423.) says, that the brother is the first degree in collaterals. And the text of the Institute * says, *superior quidem et inferior cognatio a primo gradu incipit; at ea quæ transverso numeratur, a secundo.*

Vinnius, who is a very acute commentator, in the *ratio succedendi ex jure novissimo* above cited, has an argument to prove, that the right of succeeding is not always according to the proximity of degrees. In which (p. 556.) are the words, *Concludo igitur fieri posse, ut aliqui, pari gradu constituti jure proximitatis, soli succedant, exclusis iis qui eodem gradu aut etiam propinquiore sunt, si illorum jus sit potius.* This shows, that one person may be preferred to another in equal degree *si ejus jus sit potius.*

In the present case—— *Ipsa utilitas, justi prope mater et æqui,* inclines to the preferring the brother to the grandfather; since there is in young persons a natural *spes accrescendi.* This alone

(*o*) But upon these words *Huber* has observed, that those may be said to be "next in degree *whom none precede;*" from whence he argues, that though the grandfather is excluded when the father and brothers concur; yet when the father is out of the way the grandfather becomes *next in degree*, and ought to succeed with the brothers. The truth is, that on this point civilians are divided. See *Hub. ad Inst. lib.* iii. *de Success. ab Intest. secundum Nov.* 118. § 9.

(*) Book iii. tit. 6th. part 1st.

indeed would not be sufficient to ground a determination upon; but joined to other reasons, it has its weight. And since not only the reasons are on this side the question, but the determinations have been that way, and to overthrow them would tend to introduce inconveniencies, as it might disturb distributions already made, which is an argument of the greatest weight in the law, I shall determine this point in favour of the brother, to the exclusion of the grandfather.

CHAPTER THE THIRD.

Of the Succession of COLLATERALS.

" IF a person leaves neither descendents nor ascendents at " the time of his death, we first call his brothers and sisters *of* " *the whole blood*, whom we have also called to inherit with the " fathers of deceased persons. And when there are no brothers [421] " of the whole blood with the deceased, we call those, who are " either by the same father only, or by the same mother. And " *if the deceased leaves brothers, and also nephews* by a deceased " brother or sister; those nephews shall be called to succeed " with their uncles and aunts of the whole blood to the deceased: " but however numerous those nephews are, they shall be intitled " only to that share, which their parent would have taken if alive. " From whence it follows that if a man dies, and is survived by " the children of a deceased brother of the whole blood, and also " by brothers of the half blood, then his nephews (that is, the " children of his brother by the whole blood) are to be preferred " to their uncles and aunts; for although such nephews are " themselves in the third degree, yet they are preferred, as their " parent would have been if living. And on the contrary, if a " man dies, and is survived by a brother of the whole blood, and " by children of a brother of the half blood deceased, these " nephews are excluded, as their father would have been, if he " had lived. But among collaterals, we allow the privilege of " representation to the sons and daughters of brothers and sis- " ters, and no farther; and we grant it only to brothers and " sisters' children, when they concur with their uncles or aunts, " paternal or maternal: for when descendents are called to " inherit, we by no means permit the children of a deceased " brother or sister to share in the succession; although the " father or mother was of the whole blood with the deceased " brother. But we have so far allowed the right of represent- " ation to brothers' and sisters' children, that being only in the " third degree, they are called to inherit with those who are in " the second: And this is evident, because brothers' and sisters' " children are preferred to the uncles and aunts of the deceased,

"paternal as well as maternal; although they are all in the "third degree of cognation. — But if a deceased person leaves "neither brothers nor sisters, nor brothers' nor sisters' children; "we then call all the other collaterals, according to the prerogative of their respective degrees, preferring the nearer to the "more remote: and if several are found in the same degree, "the inheritance must be divided according to the number of "persons, and this manner of dividing an inheritance is called "a division *in capita.*" *Harr. Justin. ad finem.*

Of the whole blood] We must here observe, in relation to the distinction between the whole blood and the half blood, that the law of *England* is different in this particular, according as the succession regards lands of inheritance, or personal estate. In the case of inheritances, the whole blood is always preferred, and the half blood is no blood inheritable by descent. In succession to personal estate, the law hath been more uncertain; inasmuch as the statute takes no notice of this distinction between the whole blood and the half blood, but directs the distribution to be made amongst the next of kindred in equal degree to the intestate. But being certain that brothers and sisters of the half blood are in the same degree with brothers and sisters of the whole blood, it hath been the general opinion, that according to the said statute, brothers and sisters of the half blood are entitled to an equal share of the intestate's estate with the brothers and sisters of the whole blood (2), although there are several precedents of judgments given, since the statute, allowing the half blood to have but an half share. But the law in this particular is now become fixed and certain, ever since the decree of the house of lords, in the case of *Watts* and *Crooke;* upon an appeal from a decree in chancery, which had been given in favour of the half blood, and which was affirmed by the house of lords. 1 *Strah. Domat.* 658.

And this shall extend to a *posthumous* brother of the half blood. And lord *Hardwicke* said, he could not distinguish this from the case of a child *in ventre sa mere.* If indeed it were to go to children born at any distance of time, so as to cause an inconvenience by suspending the distribution, or to cause a taking back again, it might be an objection. But that cannot happen, [423] because the child must be *in rerum natura* at the death of the intestate brother whose estate is in question; but at the utmost it cannot be carried beyond the year, in which a distribution is to be made. *Burnet* v. *Man.* Nov. 16, 1748, 1 *Ves.* 156.

(2) *Smith* v. *Tracy,* 1676. 1 *Mod.* 209. 1 *Ventr.* 316. 2 *Lev.* 173. 1 *Vern.* 437. cited. *Crook* v. *Wyatt,* 2 *Vern.* 124. 2 *Freem.* 112. 2 *Ventr.* 317. *Show P. C.* 108. S. P.

If the deceased leaves brothers and also nephews] In the case of *Walsh* and *Walsh*, *M.* 1695. A man had three brothers; one of them died, leaving three children; another died, leaving two; and the third died, leaving five children: after which he himself died intestate. It was resolved, that distribution should be *per capita*, and not *per stirpes;* and that all the children should have equal; because none of them take by way of representation, but all as next of kindred in equal degree. *Prec. Cha.* 54. (*p*)

So in the case of *Janson* and *Bury*, *H.* 1723. Lord chief baron Bury had several brothers and sisters, some of the half, and some of the whole blood, who all died in his lifetime, all leaving several children. And now upon a bill exhibited for the distribution of his estate, it was decreed by the whole court of exchequer, that the distribution should be *per capita*, and not *per stirpes;* for now they do not take by representation, but as next of kin to the intestate. But if one of the brothers or sisters of the chief baron had survived him, the children of the rest must have taken only by representation, that is to say, *per stirpes*. And the case in this court, between *Wall* and *Theedham*, was cited, which was on June 28, 1711. Dr. Wall the intestate had two sisters; Susanna, of the half blood, who left Samuel; Elizabeth, of the whole blood, who left John, Mary, and Dorothy. Both the sisters died in the lifetime of Dr. Wall. His wife, as administratrix, preferred a bill for direction in the distribution; and the court decreed one moiety of the intestate's estate to the wife, and the other moiety to be divided into four parts, one part [424] for the issue of Susanna, and three for the issue of Elizabeth. And no distinction was made between the whole and the half blood. *Bunb.* 159.

And so much for the 118th Novel of *Justinian*. We now proceed with the explanation of the other parts of the statute of distribution, and of the other statutes consequent thereupon.

[No representation among collaterals.]

No representatives admitted among collaterals, after brothers' and sisters' children] In the case of *Maw* and *Harding*, *T.* 1691; The question was, Whether the words of the statute are to be intended of brothers and sisters to the intestate; or whether, when distribution falls out amongst brothers and sisters, though remote relations to the intestate, representation shall be admitted

(*p*) And herewith the best civilians agree, *Si soli sint fratrum filii, non parentes non fratres, succedunt in capita. Cujac. ad Nov.* 118.; *et de Feud.* 2. 11. For as *Vinnius* has observed in his *Selectæ Juris Quæstiones, lib.* ii. *c.* 30. the right of representation is a fiction of law, which is introduced in order that the proximity of the surviving brother or sister may not exclude their nephews or nieces. But in this case such a fiction is unnecessary, as all the claimants are in an equal degree of proximity to the deceased.

amongst them? And the court held, that the representation should be only between the brothers and sisters to the intestate. 2 *Vern.* 233. [*Pre. Ch.* 28. S. C.] (3)

In the case of *Pett* and *Pett*, *T.* 1700. The persons claiming distribution were a deceased brother's daughter, and the grandchildren of another deceased brother. And it was held by the court, that the deceased brother's daughter only was intitled; and that a deceased brother's or sister's grandchildren shall not come in with a deceased brother's or sister's children. 1 *P. Will.* 25. 1 *Salk.* 250. [1 *Lord Raym.* 574. S. C.]

So in the case of *Bowers* and *Littlewood*, *M.* 1719. A man died intestate, leaving no wife or child, brother or sister, but his next of kin were an uncle by his mother's side, and a deceased aunt's child. The latter brought a bill against the uncle for a share of the intestate's estate. To which the defendant demurred; and the demurrer was allowed. And the lord chancellor said, that the case of *Pett* and *Pett* was in point, and that what had been urged in regard to the hardship of the case, was nothing; for so it may seem hard, that if an intestate leaves a deceased brother's only son, and ten children of a deceased half sister, the ten children shall take ten parts in eleven with the son of the deceased brother, and yet the law is so, because they all take *per capita*, and not by way of representation. 1 *P. Will.* 594.

A granddaughter of the sister, and a daughter of the intestate's aunt, are in equal degree. (4) *In case there be no child, then to the next of kindred in equal degree*] In the case of *Durand* and *Prestwood*, June 30, 1738. The intestate left two aunts, and a nephew and a niece (children of a brother deceased). By the lord chancellor *Hardwicke;* the surplus must be divided into four parts equally amongst them, they being all in equal degree, and [425] therefore the children do not take *per stirpem*, but *per capita;* but if the father of the nieces had been living, he would have taken the whole. 1 *Atk.* 455. (*q*)

(3) Where an intestate left an uncle and a deceased uncle's son, the court inclined to think that the nephew was intitled equally with the surviving uncle, but took time to consider of it. *Beeton* v. *Darking*, (1690). 2 *Vern.* 168; but the contrary is now held in *Maw* v. *Harding*, and *Pett's* case, *supra.*

(4) *Thomas* v. *Kettricke*, 1 *Ves.* 333.

(*q*) A difference is observable here between this provision of the statute of Charles 2. according to the interpretation here put upon it, and the Novel of *Justinian*, which in the third chapter prefers brothers' and sisters' children, to the uncles and aunts of the deceased, by representation, for both descriptions of persons are in the third degree. Lord *Hardwicke* observed, in *Stanley* v. *Stanley*, *infra*, 429. *n.* that the statute of distributions is inaccurately penned; and in this case it seems to have overlooked the doctrine of representation in brothers'

That no such distribution of the goods of any person dying intestate be made till after one year] But the right to the distributive share vests immediately on the intestate's death. As in the case of *Grice* and *Grice*, *H.* 1708. Where a person intitled to a distributory share of an intestate's estate, died within a year after the intestate, it was decreed, that although by the statute no distribution is to be made within a year, yet the share of the deceased person is an interest vested, transmissible to his executors or administrators: for in this sense the statute makes a will for the intestate, and it is as if a legacy was bequeathed, payable a year hence: which would plainly be an interest vested presently. Nay, where one died without wife or issue, and intestate, leaving a father, who also died before taking out administration, or altering the property of the estate; yet by the statute the right to the intestate's personal estate vested in the father, and consequently belonged to his executors or administrators, and not to the next of kin to the first intestate, who in this case happened to be a different person. 3 *P. Will.* 49.

Husband may demand and have administration] By this explanatory act of the 29 *C.* 2. the right of husbands is saved, of administering to their wives rights, credits, and other personal estates. — In the case of *Cary* and *Taylor*, *M.* 1693. The wife intitled by the statute of distribution, died before any distribution was made, and the husband died soon after without taking administration to his wife: It was decreed, that the wife's share should go to the husband's administrator, and not to the administrator of the wife. 2 *Vern.* 302. (*r*)

M. 1718. *Squibb* and *Wynne*. A wife intitled by the death of [426] her sister, to a personal estate consisting of things in action, died; her husband married again, and died intestate, without having taken administration to his first wife. The second wife took out administration to him, and also to the first wife of the goods not administered by the husband. And it was decreed that the first wife's share of her sister's personal estate should go to the administratrix of the husband. And the lord chancellor *Cowper* said, that the exception in the statute of the 29 *C.* 2. doth not confine it to the life of the husband, or to the circumstance of his having reduced any part of the wife's personal estate into

children, although that statute and the 1 *Ja.* 2. *c.* 17. admit of it where the children of a brother of the deceased concur with their uncles, in exclusion of the uncles and aunts of the deceased, and where they concur with the deceased's wife and mother. [And see *Lloyd* v. *Tench*, 2 *Ves.* 213. *Page* v. *Cook*, *id.* 214. cited. *Walsh* v. *Walsh*. *Pre. Ch.* 54. *Davers* v. *Dews*, 3 *P. Wms.* 50. *Stanley* v. *Stanley*, 1 *Atk.* 456.]

(*r*) *Vide supra*, *Administration*, 5.

possession, but provides that no part of her estate shall be distributed among her relations after her. 1 *P. Will.* 378.

M. 1718. *Cart* v. *Rees* or *Reeves.* A wife died possessed of things in action. The husband survived, and died without taking out letters of administration to his wife. After which the next of kin to the wife administered to her. And the lord chancellor *Macclesfield* held that the wife's administrator was but a trustee for the executor of the husband. And he said, that this clause in the act was made in favour of the husband, and not to his prejudice; so that it was intended by the parliament, that the husband should be within the statute of distribution so as to take the wife's things in action as to his benefit, but should not be within the same as to his prejudice; for were the construction to be otherwise, the husband of the wife intestate would be in a worse case than the next of kin, though ever so remote, which was not the intent of the statute. 1 *P. Will.* 381. (4) And the reporter adds, that Mr. Vernon cited the case of Lady *Aiscough*, wherein he said, lord *Cowper*'s opinion was the same with the lord *Macclesfield*'s, that the wife's things in action did vest in the husband by the statute of distribution; so that since this resolution, the right of administration follows the right of the estate, and ought, in case of the husband's death after the wife, to be granted to the next of kin to the husband, in the same manner as it is granted to a residuary legatee. *Id.* 382. (5)

For if a husband survive his wife, all interests vested in her belong to him; and although he dies without getting them in, or taking out administration to her, yet they belong to his representatives, and not to her's. 2 *Abr. Eq. Cas.* 424.

So in the case of *Humphreys* and *Bullen*, *T.* 1737. The wife
[427] had a legacy left her by her husband; and after married a second husband, and died. Her second husband took out administration to her, but died before he received the legacy. His next of kin took out administration to him, and received the legacy. Another person took out administration to the wife of the goods not administered, and brought a bill against the husband's administrator to repay the money. The question was, whether it belonged to the plaintiff in that right, or to the defendant as representative of the husband. The lord chancellor *Hardwicke* thought it so clear for the defendant, that he would not suffer it to be argued. He said, This is a plain case, taking it as it stood on the old statutes of administration, for thereby the husband was intitled to administration if he survived his wife. And as it stood on these statutes, nobody could call

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(4) *Elliot* v. *Collier*, 3 *Atk.* 526. 1 *Ves.* 15. 1 *Wils. C. B.* 168. S.P.

(5) And see *Humphreys* v. *Bullen*, 1 *Atk.* 458. *Bacon* v. *Bryant*, 11 *Vin.* 88. *pl.* 25. *Bouchier* v. *Taylor*, 7 *Bro. P. C.* 414.

him to an account for the effects, for the party was to administer for the good of the soul, but not to make a distribution. But by the 22 & 23 *C.* 2. *c.* 10. administrators are liable to make distribution, one-third to the wife of the intestate, and so on. Yet upon the penning of that statute, though no notice was taken of the husband being administrator of his wife, it was held not to be within the act; for no person could be in equal degree to the wife with the husband, and so he was not subject to the statute of distribution. Which matter is explained by the 29 *C.* 2. *c.* 3. § 25., which says, the husband may demand administration of his deceased wife's personal estate, and recover and enjoy the same, as he might have done before that act, which was (before that act) as his own property. And if before the statute of distribution, the husband had died before he had called in the effects of his wife, and any other person had taken out administration to the wife, he would have been a trustee for the husband. So in the case of *Cart* and *Reeves* in lord Macclesfield's time, it was held that an administrator *de bonis non* of the wife was a trustee for the representative of the husband. Therefore, though in point of law the plaintiff may be representative of the wife, yet he is only a trustee for the next of kin to the husband; and then the plaintiff, by bringing this bill against the person for whom he is intrusted, has been guilty of a breach of trust; so his bill must be dismissed with costs. 2 *Abr. Cas. Eq.* 445.

Shall die intestate without wife or child, in the lifetime of the mother] Before this statute of the 1 *J.* 2. *c.* 17. If one died [428] without wife or child, his mother had all, and his sisters and brothers nothing; as the father surviving hath all at this day. And the reason of making this statute was, because the mother might marry, and carry all away to another husband. 1 *Salk.* 251.

But if there be no brother or sister, or representative of brother or sister, then it is out of the statute, and the mother shall have the whole, as she had before the making of it. As in the case of *Jackson* and *Proudchome, T.* 2 *G.* The son died intestate without father, brother, or sister; his mother living. She makes her will, and therein makes an executor and residuary legatee; and dies within a week after her son, and without having taken administration to him. The brother of the mother takes out administration to the son, as his uncle and next friend. The mother's executor brings a bill against the uncle, who was the son's administrator, to have an account of the personal estate of the son in right of his testatrix, who was intitled to it by the statute of distribution. Lord chancellor *Cowper* said, that the administrator of the son is only trustee for the next of kin to the intestate who are intitled to a distribution by the statute, and that in this case was the mother, the son dying without father, brother, or sister; and it is an interest vested in the mother, though she

died before administration taken out to the son, and shall go to her executor and residuary legatee: and decreed accordingly. *Viner, Execut.* (Z. 12.) 1.

Without wife or child] *T.* 12 *G.* 2. [1726], *Keilway and Keilway.* R. Keilway died intestate possessed of a considerable personal estate, and without issue, leaving a *wife* and several brothers and sisters, and his mother living. The wife under the statute of *C.* 2. takes a moiety; and a question arising upon the statute of *J.* 2. how the other moiety should be distributed, whether the mother should have the whole, or only a distributive share with the brothers and sisters, a bill was brought in order to have the opinion of the court. Upon hearing, the lord chancellor *King* was clearly of opinion, and decreed, that the mother should have no more than a share of the other moiety with the brothers and sisters of the intestate; for the intent of the statute was, to put the mother (who before stood upon the same footing with the father) in the same state and condition only with these collaterals; so that whenever she is intitled, they shall have an equal share with her. *Str.* 710. [2 *P. Wms.* 344. *Gilb. Eq. R.* 189.]

[429] May 14, 1739, *Stanley* and *Stanley.* Hoby Stanley died intestate, leaving a wife and a mother living, and children of a brother deceased. These children, as representatives of their father, bring a bill to have one half of the moiety of the intestate's estate; the wife being intitled to the other moiety, and the mother (as they insisted) to have only an equal share with them. It is true, in this case there is a *wife* left; but the intent of the act was to put the intestate's brothers and sisters, and their representatives, in the same light and condition with the mother; so that whenever the mother was intitled, the brothers and sisters, and their representatives (*per stirpes*) were to have an equal share with her; and cited the case of *Keilway* and *Keilway*, which is exactly the same with the present, except that in the present case the intestate had no brother or sister living at his death, which is not material, in regard that the children of the brother take by way of representation. For the mother, who claimed the whole moiety, it was insisted, that these statutes are to receive a favourable construction, to exclude representatives in a remote degree, in respect of collaterals; and the words in the statute of *James* are in the conjunctive, and require a brother or sister to be *in esse*, as well as representatives of brothers and sisters, to make a case within this statute. It has been determined, in the case of *Walsh* and *Walsh*, that when the intestate leaves brothers' or sisters' children, and no brother or sister, such children take *per capita*, as next of kin, and not by representation; and, in the case of *Durant* and *Prestwood*, that the construction of the statute was the same, if a man died leaving aunts and nieces, and no brother or sister, such aunts and nieces would all take *per capita*, and

the nieces could not take *per stirpes*; and yet if the father of the nieces had been living, he would have taken the whole. And from thence it was argued, that as there was no brother or sister of the intestate living, if the plaintiffs in this case took any thing, it must be necessarily *per capita*, and not by representation; that when brothers' children take *per capita*, they must necessarily take as next of kin, because as they are not in equal degree with the intestate's mother, they could not otherwise take at all. And it was further argued, that if they were intitled by representation, it might be carried to the fourth or fifth generation, for there is nothing to restrain it in this act, as there is in the statute of distribution; which would create great confusion and fractions in the estates of intestates.—By the lord chancellor *Hardwicke*: [430] There are two questions in this case; first, whether the plaintiffs, who are children of the intestate's brother, shall share with the mother of the intestate, there being a *wife* of the said intestate. Secondly, supposing they may, notwithstanding that there is a wife, whether they can come in, in respect that there is no *brother or sister* of the intestate living. As to the first, it is directly within the case of *Keilway* and *Keilway;* and I am satisfied with the reason of that case. It depends upon the construction of the proviso in the statute of James, which is very incorrectly penned, and so is the statute of distribution; and therefore a construction is to be made upon the second statute, according to the intent and meaning of the legislature. Upon the statute of distribution, the descending line excluded all collaterals, and afterwards went to the next of kin, so that the father or mother would take all; therefore the subsequent statute intended, that the mother should have a provision only equal with the brother or sister of the intestate. As to the second question, it is a new one; for the intestate has left no brother or sister, for the mother to collate (*s*), or share equally with. The case of *Walsh* and *Walsh* is grounded upon the statute of Charles. The words of that act do suppose, that there must be some persons to take in their own right, and others in right of representation; but the statute of James is of a different kind, and lets in another person. Here is a mother takes an original share in her own right, and the brothers' and sisters' children take as if the brother and sister were living; for the word *and*, immediately preceding the words *the representatives*, must be construed in the disjunctive. As to the objection, that such representation might be carried to several generations, I think that consequence doth not follow; for the proviso in the statute of James is to be incorporated into the statute of Charles, which expressly says, that representation shall not be carried beyond brothers' and sisters' children: and this is agreeable to the rule

(*s*) *Quære*, If not meant, *to concur with?*

laid down by lord *Hale*, that statutes made *pari materia* shall be construed into one another. I think the statute of *James* intended to let in the rule of the civil law, which contained three lines, ascending, descending, and collateral; the descending line absolutely excluded all others; the ascending excluded all collaterals,
[431] except brothers and sisters, and they took alike. His lordship therefore ordered the residue of the intestate's estate, after satisfaction of debts, to be divided into four equal parts; two-fourth parts thereof to go to the widow, one fourth to the mother, and one fourth to the brother's children. 1 *Atkyns*, 458.

Every brother and sister] Jan. 24, 1740, *Wallis* and *Hodgson*. James Wallis died intestate; and at his death left issue Towers Wallis, his only child, an infant, who died within a week after his father; and his wife then ensient of a daughter. A bill was brought by the daughter for a moiety of the personal estate of Towers Wallis, he having died without wife or child in the lifetime of his mother. A cross bill was filed by the mother, praying that the whole personal estate of Towers Wallis might be decreed unto her. At the hearing of this cause, lord chancellor *Hardwicke* thought it was a matter of some difficulty, and directed it to stand over till he had consulted with the civilians upon it; and now delivered his opinion: That the daughter born after the death of her brother, was intitled to a moiety of his personal estate. This is a question which depends upon the statute 1 *J.* 2. *c.* 17. If the sister had happened to have been born before the death of her brother, without doubt she would have been intitled to a share of her brother's personal estate equally with her mother. The only doubt is, inasmuch as she was a posthumous sister, and born after the death of her brother. But that circumstance, I am of opinion, will make no difference. It was admitted by the counsel for the defendant, that upon the statute of Cha. 2. a posthumous child shall have the benefit of a share of the personal estate of his father, equally with the other children: for this is agreeable to the intent of that statute, and to that debt of nature which parents owe to their children. Nor can any inconvenience arise from this; because the event of there being such children must happen in nine months at farthest. But it was objected, that in collateral successions *ab intestato*, as between brothers and sisters, uncles and nephews, there is no such debt of nature: that the distributory share must vest in the party at the time of the death of the intestate, or not at all; and that great inconveniences must follow from a different determination, and that the vesting might be postponed and broken in upon, and varied by a subsequent event. And in order to specify an inconvenience of this sort that might happen, the case of the half blood has been put, that they are equally intitled to a distributory share with the whole blood; that a mother might

marry a second husband, and by that means there may be more brothers and sisters born at great distances of time, and therefore the distribution of the party's estate might perpetually vary. As to the first of these objections, that there is no debt of nature in collateral successions, that is a circumstance of no weight; for in the case of lineal successions, where that objection has been made use of as an argument for giving a share to the posthumous child, that has been only an additional corroboratory reason, and the primary reason has been the intention of the statute to preserve the estate of the father among his own children. As to the second objection, that the estate must vest immediately upon the death of the intestate; it is true that this is generally laid down in 1 *Vern.* 403. and 2 *Vern.* 274.: but this objection is of equal weight in the case of lineal successions *ab intestato*, as it is in collateral successions; yet there it has never been allowed: and this appears by the opinion of lord *Raymond*, 2 *P. Will.* 446. *Edwards* and *Freeman*. As to the third objection, that according to this doctrine, a posthumous brother or sister of the half blood would be able to take, which would introduce many inconveniences; it is very true, that on the statute of Charles the second, the half blood shall take equally with the whole; for that was finally settled in *Shower's Parliamentary Cases*, 108., where all the learning on this head is collected together; but I do not find, that it was ever determined on this statute of James the second, that a brother of the half blood should take as representative of his brother deceased. In the case of *Watts* and *Cawton*, this point was argued, and many probable reasons given for that side of the question; but there was no determination, and therefore I will leave this point unprejudiced till it shall arise. The principal reason upon which I found my opinion in the present case is, that the posthumous sister was *in ventre sa mere* at the death of her brother, and consequently was a person *in rerum natura*. Upon this ground it is, that by the rules of the common and civil law, she is capable of taking in succession. By the rules of the common law, an ensient of this kind may be vouched in a common recovery; and in behalf of such an ensient, a bill may be brought, and an injunction granted to stay waste. So in the construction of wills and uses, an infant of this sort is capable of taking; for notwithstanding the case of *Slow* and *Cutler*, it is now settled, that such an infant is capable of taking by devise. And of this [433] opinion were two judges, in the case of *Scattergood* and *Edge*, according to a manuscript report which I have of that case. But though this is so at common law, every body knows, that that which gave birth to the statute of Charles the second, was the contention then depending between the temporal and ecclesiastical courts, in relation to the power which the spiritual courts then exercised, of compelling distributions, and taking bonds for that

purpose. The rise and progress of this dispute is mentioned in 3 *Mod.* 58. and *Raym.* 496. That statute hath ascertained that point in favour of the ecclesiastical courts; and the most material clauses in it are relative to their law, and to the course of proceedings in their courts. And the several expressions in the third section shew, that the main design of the act was (as hath been mentioned) to make the exercise of that jurisdiction in the ecclesiastical courts legal, which before that time was condemned in the temporal courts. And in the case of *Smith* and *Tracy*, lord *Holt*, who was then one of the counsel, argued strongly that that statute was not to be construed by the rules of the common but of the canon and civil law; and a consultation was thereupon awarded. In the case of *Carter* and *Crawley*, it was likewise held, that that statute was directory to the spiritual courts, and was grounded principally on their law and the practice of their courts. In a case at the rolls, the master of the rolls was of opinion, that the statute was to be construed according to the canon and civil law; and afterwards, upon an appeal, lord *King* agreed to that opinion. This statute of Charles the second therefore confirms the jurisdiction of the ecclesiastical courts which hath been mentioned, and enlarges it. It sets up the *collatio bonorum* which the civil law allows of. As this is so, the statute of James the second must be construed by the civil and canon law likewise. In 1 *Ventr.* 244. lord *Hale* was of opinion, that statutes made *in pari materia* were to be taken into the construction of one another: and that the statute of the 14 *Eliz.* relating to church leases, is a kind of an appendix to the 13 *Eliz.* relating to the same matter. And this rule of construction holds more strongly in the present case, than it did in that; for this statute of James the second is a continuance of that of Charles the second, with three additional clauses; and therefore it is to be considered, as if the statute of Charles the second was repealed,
[434] and re-enacted in it. And if this is so, it is considerable what the civil law is in this particular; and by that law, an infant *in ventre sa mere* is considered as *in esse*, in those respects which are for the benefit of the infant, though not in those which are to his prejudice. This appears by many passages in the *Digest.* In the present case, the question is *de commodo ipsius partus* merely, and no ways relates to the prejudice of this infant: therefore the decree must be accordingly.

ii. *Of customs in particular places.*

By a clause in the statute of distribution (*viz.* § 4.), as hath been observed (page 393.), these customs are specially reserved and excepted. What these customs are, particularly within the city of London and the province of York, which comprehend so

large and considerable a part of the kingdom, it is somewhat strange that so few authors have taken any pains to inform their readers or themselves. The civil law acknowledgeth not these customs: nor yet doth the common law; and therefore, perhaps, neither civilians nor common lawyers have judged them a proper subject for their inquiries. And yet the general notion thereof seemeth to have sprung from the civil law, which establisheth what the civilians call the *legitime*, or legal portion, although much different from these customs: and these customs are so ancient, and of ancient times were of such general and almost universal extent, that some of the greatest lawyers have doubted whether they were not part of the common law.

The matter, in short, seemeth to have been plainly thus: Before the conquest, lands were devisable by will; of which the gavelkind lands are a standing instance. And in more ancient times still, all the children, both male and female, inherited alike; and the estate, whether real or personal, descended to all equally. (1 *Salk.* 251. *Hale's H. C. L.* 220. *Dalrymp. Feud.* 201, 202.) And this was agreeable to reason and nature; although not to the policy of government which succeeded. After the conquest chiefly, came in the military tenures with the feudal law. The eldest son was fittest to bear arms; and to the end that during the service he might be able to sustain the dignity of the military profession, he succeeded to the whole estate of land. And that the other children might not be destitute, a portion was provided for them out of the personalty, which the father might not give from them by will, nor the ordinary by distribution in [435] case of intestacy.

All antiquity speaks of this as the general and established law, except only in some few boroughs and particular places, where the people lived probably by trade, and there was not lands sufficient for the support of arms. And this accounts for it, why the lands holden in burgage tenure continued still devisable by will, when no other lands were so, except only those of gavelkind in Kent and in divers parts of Wales, which received not the laws of the conqueror.

And this order continued during all those reigns, whilst the kings were supplied with soldiers by the lords of manors and others at a price and for a time agreed on. Until at last the kings and people coming into other measures for raising of soldiers, these military services dwindled away, and were changed into pecuniary compensations. Lands in the reign of king Henry the eighth became again devisable by will. The restraints upon the personalty vanished by degrees, and only some footsteps thereof remain in particular places. In the province of York, these military services were the longer necessary, by rea-

son of the continual incursions of the Scots *; and to this day a great part of the lands within that province are not devisable by will; and until the reign of king William the third, a man there by his will might not dispose of his personal estate from his wife and children, further than his own proportionable part: and one would think by most, if not all, of the books which have been written upon the subject of wills, that have taken any notice of this matter at all, that the same law continueth still; as indeed it doth in the case of intestacies, although not in the case of last wills and testaments. For by the statute of the 4 *W. c.* 2. power is given to the inhabitants of the province of York, to dispose of their whole personal estate by will, notwithstanding their custom to the contrary; except only in the cities of York and of Chester: And by the 2 and 3 *An. c.* 5. the like power is given to the inhabitants of the city of York also. By the 7 and 8 *W. c.* 38. the like power is given to the inhabitants of the principality of Wales. And by the 11 *G. c.* 18. the like power is given to the freemen of the city of London. But the law concerning the distribution of intestates' effects, in all the said places, continues as it was before.

* In the county of Westmorland, there are many footsteps of this institution, in the customs of the several manors. In the manor of Ravenstonedale, wherein the customs were ascertained by indenture, betwixt the lord and tenants, in the 3d and 4th of *Philip & Mary*, one article is, that *the tenants should break or divide no farmholds*; or, as the same is explained by a further indenture in the 22d year of queen Elizabeth, that *none of the tenants shall divide or sever their ancient and customary tenements*, without special agreement with the lord or his steward for that purpose. Which custom being rivetted by the indentures, continues till this day, although the cause hath long since vanished. But, by permission of the lords from time to time, so many severances have been made, that it is difficult to estimate within the said manor, what might have been the value of an original military tenement.

In the manor of Kentmire, in the said county, there are remains of an establishment, which seem to lead nearer to that point. It appears that the manor was anciently divided into four quarters; each quarter into fifteen tenements; that each tenement consisted of a proportionable quantity of inclosed ground, with pasture for ten cattle in a common pasture lying within each quarter respectively, and privilege for eighty sheep in another pasture common to the whole manor; that for each tenement a man served the office of constable, paid 2*s.* a year to the curate of the chapel, and now pays 13*s.* 4*d.* rent to the lord of the manor. By which distinctions the tenements have been kept so far separate, that it is easy to calculate what the soldier's estate within that manor might be supposed to be worth by the year: for one of those ancient tenements, well husbanded, seemeth to be of the value at this day of about 10*l.* a year. *Burn.*

Lord chief justice *Coke*, who might seem well able to give a good account of these customs, had a fair opportunity in his commentary on the great charter, where the *reasonable part* is mentioned; but he passeth it over slightly, contrary to his wonted manner, and says dryly, that it is not by the common law: and quotes *Bracton* for the same.

The author of the *Law of Testaments* (which seemeth to be a book not altogether destitute of merit) professeth expressly to treat the customs of the city of London and province of York. And he hath collected a considerable number of cases relating to that subject. But with regard to the city of London, by some fatality, he hath recited the statute of the 11 *G. c.* 18. so imperfectly, that if he did understand it himself, it is impossible the reader should understand it from his manner of expressing it: but it is plain he did not understand it; for all which he delivers tendeth to prove that the custom of the city of London extends to wills as well as to the distribution of intestates' effects, and to wills especially. All which is in contradiction to the statute, as will appear. And of the statutes which give to the inhabitants of the province of York the like power to dispose of their whole personal estates by their last wills and testaments, he taketh not the least notice, nor ever mentions them. [437]

Dr. *Gibson* was a native of the province of York (6), and received his patrimony by the law and custom of that province. He recites the statutes faithfully which take away the custom as to wills within the province at large, and within the city of York in particular, and also within the principality of Wales; but when he comes to speak of the aforesaid *reasonable part*, having recited briefly the words of *Bracton* and *Fleta*, and just mentioned the writs *de rationabili parte bonorum* in the register, he says a bare reference thereto may be sufficient, since the said right is so far abolished; and he adds, that it is now little more than matter of speculation, what we find in the *Magna Charta* itself concerning the same reasonable part. And when he comes to treat particularly of the distribution of intestates' effects, although the clause of exception of these customs in the statute of distribution seemed to render an explication thereof in some sort necessary, yet he passeth it in silence.

Dr. *Swinburne* was judge of the prerogative court of York. He had great abilities, and opportunities more than any other person of his time, and inclination likewise, to obtain a competent satisfaction in this matter. His book, for the time in which it was written, is a most excellent book. And one can scarcely pardon the continuators of his work (although upon the

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(6) Born in 1669, at High Knipe, in the parish of Bampton, in Westmorland.

whole, of the better sort of this kind of authors) for attempting, as they pretend, to correct his style. It needeth no correction. Swinburne lived at a time, namely, in the latter end of queen Elizabeth's reign, when the style of writing was elegant and easy, according to the true standard of the ancients and of nature; and utterly abhorrent from that formal bombast, which (from the royal example) succeeded in the next reign. But if they could have amended Swinburne's expression, they ought not to
[438] have done it; but in an edition of Swinburne, to have exhibited Swinburne: and where he might be judged to be wrong, or where the law since his time is altered (as it is in many cases), there was scope enough for animadversion other ways. But they have mangled Swinburne, and made no distinction betwixt what is his, and what is not. By breaking the connection in improper places, and not always understanding him themselves, they have rendered even Swinburne sometimes unintelligible. All which is only intended as an apology for having separated Swinburne throughout this title, from his editors or continuators; by inserting what is Swinburne's, in his own words, and under his own name; and by distinguishing what is an addition to Swinburne, at the end of the quotation, by the letter *a*.

As to the matter before us, we must despair of obtaining a more perfect delineation of the custom of the province of York, as it was in Swinburne's days, than Swinburne hath exhibited. He was a diligent searcher into antiquity; was nearer to the fountain head than we are by almost two hundred years; was acquainted personally with the most learned men of that time; and made it his employment, to examine minutely into this particular custom; and above all, was master of the acts and records of the court of York, and availed himself of that treasure. But what is most astonishing is, that even in the very last edition of Swinburne, where he is treating of this same custom, there is no notice at all taken (by the editors) of the statutes or acts of parliament, which at one stroke utterly abolished at least one half of this custom: but for any thing which appears, the reader must judge, that the inhabitants of the province of York cannot make their testaments of their personal estates, further than to the extent of the testator's own rateable part, which was, and in the case of intestates is still called the *death's part*. Indeed there is a sketch of one of the said acts, in a corner of the book elsewhere inserted, where it hath no manner of connection, by those who did not understand, or did not consider, its importance and use.

There is some shadow of this custom, as was said before, in the civil law; and the proportions were thus: If there were four children or under, they had a third part equally amongst them; if five or more, they had a moiety. And the civil law allows a

legitime to parents, but not to widows: whereas, on the contrary, the customs we speak of do allow a legal portion to widows, but not to parents. 2 *Domat.* 119. 121.

By the statute of *Magna Charta, c.* 18., in the ninth year of king Henry the third, it is said, generally: *If nothing be owing to the king or any other, all the chattels shall go to the use of the dead* (that is, to his executors or administrators), *saving to his wife and children their reasonable parts.* [Or rather, their *proportionable* parts; ——— "salvis uxori ejus & pueris ipsius *rationabilibus* "partibus suis."]

Bracton, who wrote soon after this statute, delivers it in few words as the general law of the realm, that after debts and other necessary charges deducted, the whole residue shall be divided into three parts; of which the children, if there be any, shall have one part; the wife, if she survive, shall have another part; and the third part the testator shall have free power to dispose of. If the testator hath no children, then one moiety shall be to the deceased, and the other moiety shall be reserved to the wife. If he shall die, leaving no wife, and having children surviving; then the deceased shall have one moiety, and the children shall have the other. If he shall die without either wife or child, then the whole shall remain to the deceased. *Bract.* 60, 61. And it is to be observed, that these proportions generally do govern the customs to this day.

And the same is delivered by the author of *Fleta*, almost in the same words; and he saith, as *Bracton* had said before, that this is the law, unless there be a custom to the contrary, as in cities, towns, and villages. *Fleta, b.* 2. *c.* 57.

By a constitution of archbishop *Stratford*, which was in the 16 *Ed.* 3., it is ordered thus: Forasmuch as it happeneth sometimes, that persons dying intestate, the lords of the fees do not permit the debts of the deceased to be paid out of their moveable goods, nor the said goods to be distributed to the use of their wives, children, or parents, or otherwise by the disposition of the ordinaries, *according to that portion which, by the custom of the country, appertaineth to the deceased;* we do decree, that none shall henceforth do the same, on pain of the greater excommunication. *Lind.* 171.

According to that portion which, by the custom of the country, appertaineth to the deceased] *Lindwood* says, The portion of the deceased was, what was assigned by the ordinary for the supposed benefit of the soul of the deceased; which was to be determined by custom: sometimes (says he) it was the whole personal estate, as when there was neither wife nor child; some- [440] times one half, as where there is a wife surviving, but no children; sometimes a third part, as where there is both wife and children. *Lind.* 178.

By the custom of the country] He doth not say, of the realm;

and that for this reason, (saith *Lindwood*,) because, perhaps, throughout the whole realm one and the same custom as to this matter doth not prevail; but there are different customs according to the diversities of countries; for there may be a general custom of some province; also a special custom of some city, territory, or place. *Lind.* 172.

Fitzherbert saith, The writ *de rationabili parte bonorum* lieth, where the wife, or sons and daughters of the deceased, cannot have their *reasonable part* of the deceased's goods, after the debts are paid, and funeral expences satisfied. *F. N. B.* 284.

And it seemeth, he says, by the statute of *Magna Charta*, *c.* 18., that this was the common law of the realm; and so (he says) it appeared by *Glanvil*. *F. N. B.* 284.

And in the 31 *Ed.* 3. A woman did demand the moiety of her husband's goods because he had no children, and counted upon the custom of the realm. *F. N. B.* 284.

But in after times, and by degrees, they came to count for the same upon the particular custom of such and such places. *F. N. B.* 284.

And accordingly the writs in the register do rehearse the customs of particular counties; and are of this form:—

" The king to the sheriff, &c. If W., who was the wife of " D., shall make us secure, &c., that then you summon E. and " E., executors of the testament of the aforesaid D., that they be, " &c. to shew why, seeing that according to the custom in the " county aforesaid hitherto obtained, wives after the death of their " husbands ought to have their reasonable part of the goods and " chattels of their husbands, they the same executors aforesaid " from her the said W. her reasonable part, to the value of ten " marks, of the goods and chattels which were of the aforesaid " D. heretofore her husband, they do detain unjustly, and refuse " to render them unto her; to the great damage and grievance " of her the said W., and against the custom aforesaid. And " have you there the summons and this writ, &c."

" The king, &c. Forasmuch as B. of——— and S. his sister, " have made us secure, &c. that you summon E. and E., ex-
[441] " ecutors of the testament of D. of———, that they be, &c. to " shew why, seeing that according to the custom in the county " aforesaid hitherto obtained and approved, children after the " death of their fathers, who are not their heirs, nor were pro- " moted in the life of their fathers, ought to have their reasonable " parts of the goods and chattels which were of their fathers, " they the same executors aforesaid, from the aforesaid B. and S., " after the death of the aforesaid D. their father, whose heirs " they are not, and who were not promoted in the life of the " same their father, their reasonable parts, to the value of ten " pounds, of the goods and chattels which were of the aforesaid " D. their father, they do detain unjustly, and refuse to render

"the same unto them; to the great damage and grievance of "them the said B. and S., and against the custom aforesaid. And "have you there the summons and this writ, &c."

In the case of *Stapleton* and *Sherrard*, *H.* 1684. (1 *Vern.* 305.) It was said, that the custom of the province of York is the same with the custom of the city of London, unless in the case where the eldest son hath lands by descent: but it will appear when we come to treat of them separately, that there are other differences.

And first, of the custom of the city of London.

iii. *Of the custom of the city of* London *in particular.*

Statute enabling [freemen] to dispose by will.

1. By the 11 *G. c.* 18. Whereas great numbers of wealthy persons, not free of the city of London, do inhabit and carry on the trade of merchandize and other employments within the said city, and refuse or decline to become freemen of the same, by reason of an ancient custom within the said city, restraining the citizens and *freemen* of the same from disposing of their personal estates by their last wills and testaments: to the intent therefore that persons of wealth and ability, who exercise the business of merchandize and other laudable employments within the said city, may not be discouraged from becoming free of the same, by reason of the said custom, it is enacted, that it shall be lawful to *all persons who shall* after June 1, 1725, *be made free* or *become free* of the said city; and also for all persons who are already free, and on the said first day of June, 1725, shall be unmarried, and not have issue by any former marriage (*u*), to give and devise, will and dispose of their personal estates, to such uses as they shall think fit: any custom or usage in the said city, or any by- [442] law or ordinance made or observed within the same, to the contrary thereof in any wise notwithstanding. § 17. (7)

Provided that in case any person, who shall at any time after the said first day of June, 1725, become free of the said city; and any person who is already free, and on the said first day of June, 1725, shall be unmarried, and not have issue by any former marriage, — hath agreed or shall agree by any writing under his hand, upon or in consideration of his marriage or other-

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(*u*) [The custom of London, giving the widow a moiety of her husband's personal estate, was held not to be taken away by this section, where the husband had issue by a former wife.] *Dansen* v. *Hawes*, *Amb.* 276.

(7) Thus in *Webb* v. *Webb* (1689), 2 *Atk.* 110., the wife, by the custom of London, was held entitled to a moiety of articles, specifically devised by will to other persons, and also to have a moiety of the whole personalty by the custom, and the use of the other moiety by the will. *Rider*'s case there cited is *acc.*

wise, that his personal estate shall be subject to, or be distributed or distributable according to the custom of the city of *London*; or in case any person so free, or becoming free, as aforesaid, shall die intestate: in every such case, the personal estate of such person so making such agreement, or so dying intestate, shall be subject to, and be distributed and distributable according to the custom of the said city; any thing herein contained to the contrary notwithstanding. 11 *G. c.* 18. § 18.

So that as to *intestates*, the custom continueth as it was before; which seemeth to be as follows: —

Custom of distribution in case of intestacy.

2. If a freeman of London dies, in London or elsewhere, leaving *a widow and a child or children*; his personal estate (after his debts paid, and the customary allowance for the funeral, and for the widow's chamber [*viz.* her apparel and the furniture of her chamber (2 *Bla. C.* 518.)], being first deducted thereout) is by the custom of the said city to be divided into three equal parts, and disposed of in the following manner; to wit, one third part thereof to the widow, another third part to the children, and the other third part (being taken out of the custom) is now made subject to the statute of distribution [1 *J.* 2. *c.* 17.]: and so dividing the whole into nine parts, four-ninths belong to the wife, and five-ninths to the children. [*Rutter* v. *Rutter* (1683), 1 *Vern.* 180. *Fowke* v. *Hunt*,] 2 *Salk.* 426. *L. Raym.* 1328. Note: In the case of *Biddle* and *Biddle*, 18 Mar. 1718, before lord *Parker*, it was said, that the widow is intitled to the furniture of her chamber; or in case the estate exceeds 2000*l.* then to 50*l.* instead thereof. *Viner*, tit. *Customs of London*, *b.* 2. (8)

If a freeman *hath no wife, but hath children*; the half of his personal estate belongs to his children, and the other half (being the dead man's [or testamentary] part) is in like manner distributable by the statute. [*Northey* v. *Strange*,] 2 *P. Will.* 341.

So if *he hath a wife and no children*; half of his personal estate belongs to his wife, and the other half is distributable; and in this case one moiety of the dead man's part distributable by the statute as aforesaid, belongeth unto the wife by the said statute;
[443] so that in the whole she will have three-fourths of the personal estate, besides her widow's chamber. 2 *Salk.* 246. *Law of Test.* 211.

If he hath *neither wife nor child* at the time of his death, then the whole belongs to the deceased, and is distributable by the statute. *Law of Test.* 192. [2 *Show. R.* 175. It seems formerly to have been held that where there are several children, the father

(8) But this right, in analogy to the widow's right to paraphernalia in general cases, shall not be exercised to the prejudice of creditors. *Swinb.* p. 6. § 13. This privilege is not by the custom, and was originally allowed only to citizens of a better sort, yet it is fit to extend it to all citizens' widows. *Readshaw* v. *Duck*, 7 *Vin.* 217. *pl.* 5.

may appoint a right of survivorship among them. If there be a male child only, the father may devise over his orphanage part, if the child should die before 21; and so if only a female child, if she should die under that age, or unmarried. *Piddington* v. *Mayne*, *E.* 1727, *Vin.* tit. *Custom of London*, (B.) *Ca.* 16. *Hamond* v. *Jones*, 1 *Lev. R.* 227. But latterly it has been admitted to be otherwise. See *Jesson* v. *Essington*, *Pre. Ch.* 207. *Biddle* v. *Biddle*, *H.* 1718. *cor.* lord *Parker*, *Vin. Ab.* tit. *Customs of London*, *b.* 2.]

The *death's part* distributable according to the statute of distribution.

3. Concerning which *death's part*, to be distributed by the statute, it is enacted by the 1 *J.* 2. *c.* 17. as followeth: For the determining some doubts, arising on the statute of frauds and perjuries, it is enacted and declared, that the clause therein whereby it is provided that that act or any thing therein contained should not any ways prejudice or hinder the customs observed within the city of London and province of York, was never intended nor shall be taken or construed to extend, to such part of any intestate's estate, as any administrator, by virtue only of being administrator, by pretence or reason of any custom, may claim to have to exempt the same from distribution; but that such part in the hands of such administrator shall be subject to distribution, as in other cases within the said act. § 8.

It was called the *dead man's part*, because the ordinary, or he to whom the ordinary should commit administration, was to dispose of the same to pious uses, for the benefit of the soul of the deceased; but administrators, under pretence of concealed debts, did frequently keep the greatest part thereof to their own use: and after this statute of the 1 *J.* 2. in the case between the widow and the son of sir *Richard How*, knight, the widow as administratrix claimed to herself the death's part by virtue of the letters of administration granted to her of her husband's estate; but this being thought unreasonable, was contested by the son in chancery with his mother-in-law; and upon hearing the cause, it was settled and decreed to be observed for ever, that the deceased's part should be divided according to the statute of distribution, in pursuance of this explanatory clause of the 1 *J.* 2. *c.* 17. *Green's Privil.* 49, 50. (9)

Superintendency of the court of orphans.

4. The court of orphans is held by custom time out of memory, before the lord mayor and aldermen of the city of London; who are guardians to the children of all freemen of London, that are under the age of twenty-one years at the time of their father's decease. *Privilegia Londini*, 288.

And if a freeman or freewoman die, leaving orphans within age unmarried; the court of orphans shall have the custody of their body and goods: and the executors or administrators shall ex-

(9) See 2 *Freem.* 85. 1 *Vern. Rep.* 133.

hibit inventories before them, and become bound to the chamberlain to the use of the orphans to make a true account upon oath, and if they refuse, shall commit them till they become bound. *Priv. Lond.* 280. [*Luck's* case, *Hob.* 247.] And their being bound so to do in the spiritual court, excuseth them not from this custom. *Law of Ex.* 252.

For if the father is a freeman of London, he cannot devise the disposition of the body of his child; and if he do, yet the infant shall remain in the custody of the mayor and aldermen. *Privil. Lond.* 287.

Children intitled, though born out of the city, [and though their father neither lived or died, or had property in London.]

5. The children of a freeman of London are entitled to the share of his personal estate, though they were born out of the city; and though their father did not inhabit or die in London. *Law of Test.* 202. [And are city orphans. *Webb* v. *Webb*, 2 *Vern.* 110. See 1 *Roll. R.* 316. 1 *Sid. R.* 250. 1 *Ventr.* 180. 1 *Mod.* 80. S.P. If an orphan is taken out of the custody of the committee appointed by the court of orphans, they may imprison the offender, though a peer, till he produce the infant. 1 *Sid.* 250. *Lord Raym.* 116. *Wilkinson* v. *Boulton*, 1 *Lev.* 162. So if any one, though not a freeman, without consent of the court of aldermen, marry such orphan under twenty-one though out of the city, they may fine and imprison him for non-payment; for if the custom should not extend to marriages out of the city, their power would be vain. *The King* v. *Harwood*, 1 *Vent.* 178. 1 *Lev.* 32. 1 *Mod.* 79.]

And also, though their estate doth not lie in the city, but elsewhere. *Priv. Lond.* 288.

Child intitled, though born after the father's death.

6. An after-born child shall come in with the rest for a customary share of the father's personal estate. *T.* 1718, *Walsam* and *Skinner*, *Prec. Cha.* 499. (1)

Child dying, the orphanage part survives. [See page 443.]

7. *T.* 1706, *Wilcocks* and *Wilcocks*. A child intitled to an orphanage share of his father's personal estate, dying under twenty-one, and unmarried, cannot devise it by his will; for by the custom it survives to the other children: but he may devise the share which he hath under the statute of distribution, [for that is vested.] 2 *Vern.* 559. [2 *Bla. C.* 519. And if a female dies under that age, and unmarried, her share survives also; for an orphan cannot give it away by will. (2) *Pre. Ch.* 207. 537. But if there is only one child, his orphanage part is vested in him in the same manner as his share by the statute, and is devisable by him at the same age. 3 *P. Wms.* 318. *note* (2). *Vid.* also *Prec. Ch.* 207. *Merriweather* v. *Hester*, 7 *Vin.* 209. *pl.* 18.]

In the case of *Fouke* and *Lewen*, *M.* 1682, [1 *Vern.* 88, 89.]; it is said, that if a man marries an orphan, who dies under twenty-

(1) *L. Test.* 203. 11 *Vin. Ab.* 200. *Gilb. Eq. Rep.* 155.
(2) *Jesson* v. *Essington*, *M.* 1702. *Pre. Cha.* 207.

one; her orphanage part shall not survive to the other children, but shall go to the husband.

But in the case of *Merriweather* and *Hester*, *T.* 5 *G.* a case was cited between *Ambrose* and *Ambrose*, and another between *Rawlinson* and *Rawlinson*, where it had been certified to be the custom of London, and was accordingly decreed by the lord chancellors *Harcourt* and *Cowper* successively, that if a city orphan dies before 21, his orphanage part survives to the other orphans, and that he can make no disposition by will to contradict it; but if he dies after 21, at which time he might by will have disposed of it, there, though he die intestate, it shall go according to the statute of distribution, between his mother and surviving brothers and sisters; and that in the other case, where he dies before 21, the survivorship holds only as to the orphanage part belonging to himself, so that if he had by survivorship the part of any other of his brothers or sisters, that should go according to the statute of distribution. It was also said, that if a man marries an orphan, [445] yet till twenty-one his right is not so vested, as to prevent his wife's share from surviving, in case she died before twenty-one. *Prec. Cha.* 537.

So if a man marries an orphan, and dies; his representatives are not entitled to any part of what was his wife's customary share, but the whole belongs to the wife. *Viner*, *Custom of London.* (B. 10.) 18.

Wife divorced.

8. A wife divorced for adultery, shall not have her customary share. [*Pettifer* v. *James.*] *Bunb.* 16.

Husband attainted.

9. Where the husband was attainted of felony, and pardoned on condition of transportation; and afterwards the wife became intitled to some personal estate as orphan to a freeman of London; this personal estate was decreed to belong to the wife, as to a *feme sole*. *T.* 1729. *Newsome* and *Bowyer*. 3 *P. Will.* 32.

[Wife's customary part.]

10. If a freeman having several children, or but one child, doth fully advance all his children or his single child; this satisfies the custom, and is the same as if he had no child, and his personal estate shall go as if there was none. So if a freeman compound with his wife before marriage, for her customary part; it is the same as if there was no wife. 2 *P. Will.* 527. [When a husband dies intestate, his widow is bound by her contract not to claim by the custom of London. *Pickering* v. *Lord Stamford*, 3 *Ves.* 336.]

M. 1710. *Hancock* and *Hancock*. Where the wife of a freeman of London is compounded with before marriage, by settling a jointure, although of land; the wife is taken as advanced, and the children by the custom of London shall have a moiety as if the wife was dead. 2 *Vern.* 665. So if all the children are advanced, the wife shall have a moiety. *Clare* v. *Demooty*, *ib.*

H. 1718. *Babington* and *Greenwood*. A jointure by a freeman

on his wife in bar of dower, will not bar her of her customary part: otherwise it is if said to be in bar of her customary part. 1 *P. Will.* 580. (3)

M. 1727. *Lewin* and *Lewin*. If a woman before marriage with a freeman of London, accepts of a settlement upon her, to take effect after her husband's death in case she survives him, of part of his personal estate, (without taking notice of the custom of London,) she is thereby barred of her customary part of his personal estate. 3 *P. Will.* 16.

T. 1734. *Pusey* and *Desboverie*. Lord chancellor *Talbot*, taking notice of the contrary determinations made by the court in this point, said, it had been of late settled, that where a wife was compounded withal, it should be taken, as if there was no wife; and consequently that the husband should have one moiety, and the
[446] children the other. [3 *P. W.* 315. 1 *id.* 644.] The like was held by the lord *Hardwicke*, in the case of *Morris* and *Burrow*, in the year 1737. [*Metcalf* v. *Ives*, 1 *Atk.* 63. S. P. and see *Blunden* v. *Barker*, 1 *P. Wms.* 634. Covenants in the marriage settlement of a freeman of London, that the husband might dispose of the wife's share by will, and also that her executors should release and convey all her interest, &c. to the husband, were held not to vary the general rule that the children should not be entitled to the benefit of a composition with the widow. (4) The wife of a freeman of London shall not take by her husband's will, and also by the custom, unless it be so declared in the will (5); she must disclaim all benefit under the will, if she will have the customary share in contradiction to it (6); but she need not elect to take either by the will or custom till she has seen into the value of her husband's effects; though she may be concluded by her own acts, and by acquiescence, as where she had lived a year or more after her husband, and accepted an interest under his will. (7)]

What shall be deemed a sufficient

11. It is said, generally, by the author of the *Law of Testaments*, that any provision made by the father in his lifetime for his children, is advancement within the custom; but a settlement of a

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(3) *Pre. Ch.* 505. S. C. And so as to her distributive share under the statute, she shall not be barred unless express words in the marriage settlement exclude her. *Whithell* v. *Phelps*, *Pre. Ch.* 327. But if there are sufficient words in the settlement, the wife will be barred; it then being as if there was no wife, the children taking one half by the custom and the other half by the statute. *Blunden* v. *Barker*, 1 *P. Wms.* 644. *Cleaver* v. *Spurling*, 2 *id.* 527.

(4) *Knipe* v. *Thornton*, *H.* 1762, 2 *Eden's Rep.* 118. The law of the city has fluctuated on this point till of late years. *Ib.*

(5) *Kitson* v. *Kitson*, 1712, *Pre. Ch.* 351.

(6) *Edmundson* v. *Cox*, 1716, 2 *Eq. Ab.* 275. *pl.* 6.

(7) *Harvey* v. *Ashley*, 3 *Atk.* 616. See *Tomkins* v. *Ladbroke*, 2 *Ves.* 593.

real estate on a child is no advancement, nor to be brought into hotchpot. *Law of Test.* 194. 204. [1 *Ch. C.* 160. 235. 1 *Vern.* 2. 2 *P. Wms.* 274. Nor though made expressly for the purpose shall it bar him of the orphanage part (*Rich* v. *Rich*, 2 *Ch. C.* 160. See *Civil* v. *Rich*, 1 *Vern.* 216. 2 *Jon.* 204. *Annand* v. *Honeywood*, 1 *Vern.* 345.), unless accepted as advancement in bar of the custom (*Cox* v. *Belitha*, 2 *P. Wms.* 272): a lease for years is an advancement. S. C.] advancement. [See *ante*, 388, 389.]

But Mr. *Vernon* questioneth, whether every provision made by the father for his child be an advancement, or whether only such a provision as is made on the marriage of a child. And he answers, that it seemeth to be only such a provision as is made on marriage, or in pursuance of a marriage agreement. 1 *Vern.* 89. (8)

And in the case of *Jenks* and *Holford*, *M.* 34 *C.* 2. The plaintiff exhibited his bill, setting forth that his wife's father was a citizen of London, and that he had not advanced her in his lifetime, and demanded her customary part, and prayed an account. It was insisted on the defendant's part, that the plaintiff's wife was advanced by her father in his lifetime, he having given her 400*l.* But the lord chancellor was of opinion, that it could not be any advancement, unless it had been given her as a marriage portion, or in pursuance of a marriage agreement; and the 400*l.* were not given till a long time after her marriage, and without any agreement that the same should be for her marriage portion, and was a free gift, great part of the sums that made up the 400*l.* being given at christenings and lyings in. Next, it was insisted for the defendant, that these several sums, howsoever given, ought (if the plaintiff will come in for his wife's customary part) to be cast into hotchpot: But the plaintiff's counsel denied it; and took a difference betwixt a free gift subsequent to the marriage, and where the same is given in marriage; and compared it to the case of an heiress, where she has lands given her in frank marriage, those must be cast into hotchpot; but otherwise it is of lands conveyed or given to her by her father or other ancestor after the marriage. But not allowed by the lord chancellor. And the plaintiff not consenting to cast into hotchpot the 400*l.* given unto his wife as aforesaid, the bill was dismissed. 1 *Vern.* 61. (9)

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(8) Thus, though *Judd*'s law (an act of common council *temp.* H. 6.) did not make any provision a bar unless it was an advancement *on* marriage, yet an advance made after marriage by parents on both sides, to buy a commission, was held an advancement, as appearing to be intended as a marriage portion. *Hearne* v. *Barber*, 3 *Atk.* 213. See *Fawkner* v. *Watts*, 1 *Atk.* 406. *n.* 1. *Hume* v. *Edwards*, 3 *Atk.* 450. 453.

H. 1683. *Civil* and *Rich.* The custom of the city of London touching orphans was certified to be, that where an heir or coheir had a *real estate* settled on him or her by the father, the same was out of the custom of the city of London; and though the father should afterwards declare the same to be a full advancement for such child, yet that was no bar to his orphanage part, neither was it to be brought into hotchpot; but was clearly out of the custom. And it was said, that by the custom of the city of London, where a child is married with the father's consent, and there is a portion given in marriage; such child is debarred from claiming any benefit of the orphanage part; unless the father shall by writing under his hand and seal, not only declare that such child was not fully advanced, but likewise mention in certain, how much the portion given in marriage did amount unto; that so it may appear what sum is to be brought into hotchpot. 1 *Vern.* 216.

M. 1685. *Annand* and *Honeywood.* The question was, whether *money* given by the father *to be laid out in land* to be settled on the son and the intended wife for their lives, with remainders in tail, should be reckoned to be an advancement by part of the personal estate of the father, so as that the son ought to bring the same into hotchpot, to entitle him to a share of the personal estate. Lord chancellor: There is no colour to reckon this any part of the personal estate. 1 *Vern.* 345. (9 *a*)

T. 1699. *Chace* and *Box.* If any freeman's child be married in the lifetime of his or her father, by his consent, and not fully advanced to his full part or portion of his father's personal or customary estate, as he shall be worth at the time of his decease; such freeman's child so married as aforesaid, shall be excluded and debarred from having any further part or portion of his or her said father's personal or customary estate to be had at the time of his decease; except such father, by some writing by him written and signed with his name or mark, shall declare and express the value of such advancement: and then every such child, after the decease of his father, producing such writing, and bringing such portion so had of his father into hotchpot, shall have as much as will make up the same a full child's part or portion of the customary estate which his father had at the time of his decease; notwithstanding such father shall by any writing under his hand and seal declare such child was by him fully advanced. *L. Raym.* 484. 1 *Eq. Ab.* 454.

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(9) But it seems the custom on this head is not so restricted, but extends to any other establishment of the child in life. *L. of Test.* 204. 1 *Atk.* 403. See also 1 *P. Wms.* 542.

(9 *a*) Where a grant of a copyhold was made to a son, but the father, at the same time, surrendered it to the use of his will; Held, that it was clear he meant it to remain at his own disposal, and therefore it was not to be considered an advancement to the son. *Prankerd* v. *Prankerd.* 1 *Sim. & St. R.* 1.

Note, it is said to be sufficient if he declare the same by *any* writing under his hand, or by any thing written by him, although it be in an almanack, or elsewhere. *Green's Privil. of L.* 53. [448]

H. 1708. *Dean* and *Lord Delaware.* The father's declaring, that the child was fully advanced or not advanced, was of no avail, unless it appeared what the advancement was in certainty; to the intent it might be known, whether such advancement did amount unto as much as would have belonged to the child by the custom. 2 *Vern.* 630.

T. 1729. *Cleaver* and *Spurling.* If a freeman hath advanced his child on marriage, and the certainty of that advancement doth not appear under the freeman's hand; this is to be taken as a full advancement, till the contrary is shewn: but the freeman's declaration alone, that he hath *fully advanced* his child, is not of itself sufficient; for at that rate it would be in the power of every freeman, by making such declaration, to bar his child of the orphanage part. 2 *P. Will.* 527. (*v*)

(*v*) [*Elliot* v. *Collier*, 3 *Atk.* 526. 1 *Wils. C.B.* 168. 1 *Ves.* 15. S.P.] *Farnham* v. *Phillips*, 2 *Atk.* 214. & 523. A freeman of London made his will, and divided his estate according to the custom, and the dead-man's part he devised amongst his wife and children. Afterwards, in his lifetime, he married one of his daughters, and gave her 1000*l.*, which in the marriage articles was called her portion or provision. This the court declared to be a satisfaction of her orphanage share, but not to exclude her from a share of the residue, which at the time of making the will was uncertain.

[A freeman of London by his will charged 1500*l.* on his real estate for his daughter, and also gave her 1500*l.* out of his personal estate. The daughter would take the 1500*l.* out of the real estate, which is out of the custom, and also claim her orphanage part; but the court in regard the testator had disposed of all his real and personal estate among his children, and intended an equal division, would not suffer the child to disappoint her father's will, but compelled her to abide entirely by the will or by the custom. *Cowper* v. *Scott* (1731), 3 *P. Wms.* 122.

A child of a freeman must abide by the will *in toto*, or by the custom *in toto*. *Pugh* v. *Smith*, 2 *Atk.* 13. See *Morris* v. *Burroughs*, 1 *Atk.* 404. 2 *Atk.* 629. But this is otherwise if the father expressly mentions that the legacy shall come out of his testamentary share. *Car* v. *Car*, 2 *Atk.* 277. 1 *P. W.* 722. S. P. *contra*, *ib.* 533. A child is not obliged to elect between a legacy and the orphanage part till after the account is taken. *Hender* v. *Rose*, cited 3 *P. Wms.* 134. *n.*; and *Frederick* v. *Frederick*, 1 *P. Wms.* 722.

In cases on the custom of London, the effect of advancement is only to remove one child out of the way, and increase the shares of others, but not to increase the part of which the father would have power to dispose. *Folks* v. *Western*, *E.* 1804, 9 *Ves.* 460. Conveyances made to evade the custom are fraudulent, and always set aside in equity. *Edmundson* v. *Cox*, (1716) 2 *Eq. Ab.* 275. *pl.* 6. See *Hall*

Child of age may release the customary part. [See 462*].

12. [The interest which a child has in such orphanage part is a mere contingency, and no present right; and therefore a release of it is not valid in point of law; but if founded on a valuable consideration, shall operate as an agreement, and be binding in equity. (1) Therefore] the child of a freeman of London, when of age, may, in consideration of a present fortune, bar herself of her customary part. As in the case of *Lockyer* and *Savage, M.* 6 *G.* 2. The father, on his daughter's marriage, agrees to give her 3000*l.*; which she, being of age, covenants to receive in full of her customary share as a freeman's daughter: and though it was objected, that such a future right cannot be released, and that parents might make an ill use of the power they have over their children, in forcing them to give such discharges; yet this was held a good bar of the custom, there being no fraud in the transaction. 2 *Abr. Cas. Eq.* 272. *Str.* 947.

But such release, without a valuable consideration, is not good; for in such case, at the time of the release, the children having neither *jus in re* nor *jus ad rem*, the whole being in the father during his life, there is nothing for any release to operate upon. 1 *Atk.* 402. [And a release of the orphanage part to which a child is forced by a father for the sake of his maintenance merely, and not for advancement in marriage or trade, is void. *Heron* v. *Heron*, 2 *Atk.* 160. *Barn. Ch. Rep.* 450. See *Ambrose* v. *Ambrose*, 1 *P. Wms.* 321.

[449]

Whether the husband can release.

13. In the case of *Kemp* and *Kelsey, M.* 1720. The plaintiff's wife was a freeman's daughter; and after her marriage, her father gave her 100*l.*, and the plaintiff executed a release for the 100*l.* in full of all his wife's customary part or share which was or might be due to her by the custom of London. The father died. A bill was brought for a discovery of the personal estate, and that upon the plaintiff's bringing the 100*l.* into hotchpot, they might be let into a customary part of the father's estate. The defendant pleaded the release in bar. And by the lord chancellor *Macclesfield*: The husband had no power to release a future interest of his wife's. She might survive him; and would then be entitled to it in her own right. Besides, this release is suggested to be fraudulently obtained. And therefore his lordship ordered the plea to stand for an answer, with liberty to except, so as to have an account of the freeman's personal estate, and the benefit of the release to be saved to the hearing, when the question would come more properly, whether the release by the custom was good or not. 2 *Abr. Eq. Cas.* 267.

v. *Hall*, 2 *Vern.* 277. 2 *Ves.* 591., &c. &c. If a freeman of London has before his death advanced a child, and it is known what such advancement is, it shall be brought into hotchpot, and not otherwise. *Bright* v. *Smith, Freeman's Ch. Cas.* 279.]

(1) 1 *P. Wms.* 636. 639. 2 *P. Wms.* 273.

E. 1725. *Cox* and *Belitha.* A freeman of London had two daughters and one son. One of the daughters married; and on receiving a suitable portion, the husband released all right and interest which he had or might have to any part of the father's personal estate, by the custom or otherwise; and covenanted that at any time after the death of the father he would do any further act for the releasing of any right which he might have by the custom. *Jekyll* and *Gilbert*, commissioners, inclined to think, that the release being for a valuable consideration, purporting an agreement to quit the right to the orphanage part, to be binding in equity; but though this might not be so clear, yet the covenant for a valuable consideration to release the future right is good: and so they decreed on the execution of the release. 2 *P. Will.* 272.

June 18, 1737. *Medcalfe* and *Ives.* A bill was brought to have a specific performance of articles made on the marriage of the defendant, whereby the defendant and his wife covenanted, in consideration of 2000*l.*, the wife's marriage portion, to release all the right and interest that might accrue to them out of her father's personal estate by the custom of the city of London, he being a freeman of the said city. The defence made for the defendant was, that the customary part being a mere possibility and contingency, which might or might not happen, it could not be released; and if it could, that at the time of the articles, [450] the wife was an infant, and so not bound by them; besides that the 2000*l.* was no consideration for releasing such an interest, the wife's father having died worth upwards of 20,000*l.* By the lord chancellor *Hardwicke:* Though hardships may happen on my determination, yet these are considerations too loose either for a judge at law or in this court to lay any weight upon; and I must determine according to the facts, by the rules of law, and of this court. In this case there appears to have been a valuable consideration for the agreement in the articles, because at the time when the 2000*l.* was given, the defendant's wife was entitled to no part of the estate of her father, and it was given for her advancement in the world, and it is highly reasonable that such kind of articles should be carried into execution, and that when a father is bountiful to his children in his lifetime, he should have his affairs settled to his own satisfaction. As to the objection of the customary part being a possibility, and merely in contingency, it is of no weight; for there is no doubt but it might be released in equity: but here is a covenant, which the defendant is bound by in all events. And it is no objection to say, that the wife was under age; for though in this respect, if the husband were dead, the articles would not bind her, and she would by survivorship be entitled to the customary share, as a chose in action not recovered, or received by the husband; yet

he being alive, it is a matter that accrues to him in right of his wife, and he may release it, and his release will bind her; and therefore it was reasonable he should perform his covenant. I found my opinion too on an old law well known in the city, by the name of *Judd's* law; whereby a husband was authorised to agree with the father for the wife, though she was under age. 1 *Atk.* 63. [But such release shall be altogether ineffectual if in any manner extorted or obtained by undue influence. (2) Or without consideration. (2 *a*)]

Whether the share released shall fall into the dead man's or the orphanage part.

14. In the last mentioned case of *Medcalfe* and *Ives*, a question arose, whether the orphanage part, covenanted to be released by the husband, should fall into the dead man's part, and go wholly according to his disposition of the residue of his estate, as a thing purchased by him; or whether it should fall into his personal estate, and be distributed with it according to the custom. And the lord chancellor said, that as in equity things covenanted to be done are things actually done, it must be considered as if the husband had actually released, and so is an extinguishment of his wife's right to the orphanage part; and being an extinguishment of the right, it leaves the estate of the father as if it had [451] never been charged with it, and must therefore be considered as a part of his general personal estate, and not go wholly to the executor of the father as part of the dead man's share. 1 *Atk.* 64.

Whether marriage without consent bars the custom.

15. In the case of *Hill* and *Blanket*, *H.* 28 *C.* 2. It is said, that there is no such custom, as that a child marrying under the age of eighteen, without the father's consent, shall lose her orphanage part. *Cha. Ca. Finch.* 248.

But in the case of *Foden* and *Howlett*, *H.* 1 *J.* 2. By *Jefferies* lord chancellor: If the daughter of a citizen of London marries in his lifetime against his consent, unless the father be reconciled to her before his death, she shall not have her orphanage share of his personal estate: and it would be unreasonable to take the custom to be otherwise. 1 *Vern.* 354. (3)

And if any person intermarry with an orphan without consent of the court, such person may be fined by them, according to the quality and portion of the orphan; and unless such person pay the fine, or give security to pay it, they may commit him to Newgate, to remain there till he submit to their orders. *Priv. Lond.* 282, 283. (*w*)

And he that marries an orphan without consent of the court, must make a jointure before he receives the portion. *Priv. Lond.* 286.

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(2) 2 *Atk.* 160. 1 *P. Wms.* 639.

(2 *a*) 1 *Atk.* 63. 402. 2 *Atk.* 161. 1 *P. Wms.* 639. 2 *P. Wms.* 473.

(3) See *Tomkyns* v. *Ladbrooke*, 2 *Ves.* 591. *Thorne* v. *Edwards*, 3 *Atk.* 450. 453.

(*w*) *Vide supra*, *Form and Manner*, 7. *in fine*.

16. *E.* 1686. *Fowke* and *Hunt.* A freeman of London dies leaving a widow and no children, but hath several grandchildren living at the time of his death. And the question was, whether they were within the custom of the city of London or not. The lord chancellor took time to consider of it; and having consulted the recorder and several of the aldermen, delivered his opinion, that grandchildren were not within the custom of the city of London. 1 *Vern.*397. [*Finner* v. *Longland*, 2 *Eq. Ab.*264. *pl.* 5. S. P.] Custom extends not to grandchildren.

H. 1716. *Northey* and *Strange.* It was admitted by counsel, and said to have been so determined, and settled, that a freeman's grandchild (where the grandchild's father was never advanced in the freeman's lifetime, and died before the freeman, leaving a child) was not within the custom; and that only the freeman's children were within the custom, to come in for an orphanage part. 1 *P. Will.* 341. 2 *Salk.*426. [*L. Test.*210.]

17. If a freeman of London hath but one child, and he has received some portion from his father, and the father dies, leaving this child and a wife; the child shall have his full orphan's part, without any regard to what he hath already received: for that advancement in part is only to be brought into hotchpot with children, and not with others: By Sir *Edward Northey.* [*Fowke* v. *Hunt*,] 2 *Salk.* 426. Hotchpot only amongst children. [452]

M. 1685. *Beckford* and *Beckford.* The only point was, upon the custom of the city of London, where a child that had a portion, but was not fully advanced, and was to bring her portion into hotchpot: whether the portion should be brought into the personal estate in general, that so the widow might come in for part of it, or whether it should be brought into the orphanage part only. Lord chancellor: It is beyond all doubt, that it must be brought into the orphanage part only. [2 *Vern.* 281. *Annand* v. *Honeywood.*] 1 *Vern.* 345.

T. 1691. *Fane* and *Bence.* Where an only child is in part advanced by the father in his lifetime, such child shall not bring his part into hotchpot, there being none in equal degree with him. 2 *Vern.* 234.

T. 1729. *Cleaver* and *Spurling.* A freeman of London having but one child, advanceth that child in part only; the child shall take a full share, without bringing what he had before received into hotchpot: for the only meaning of bringing the child's share into hotchpot is, to make an equality among the children; and not for the benefit of the mother, or to increase the dead man's share. 2 *P. Will.* 526.

18. A lease for years attending the inheritance of a freeman of London, is not assets within the custom. 1 *Vern.* 2. 102. [*See* 2 *P. Wms.* 272.] Lease.

19. So if a citizen of London has a trust of a term attending Trust of a term.

his inheritance, and dies; the trust of the term shall not be subject to the custom of London, to be divided between the wife and children, as other personal estate and chattels shall. 2 *Freem.* 66.

Mortgage. 20. A mortgage in fee shall be counted part of a freeman's personal estate, and subject to the custom. 1 *Cha. Ca.* 285.

A mortgage shall be paid out of the personal estate, in preference to the customary or orphanage part by the custom of London; because the custom of London cannot take place till after the debts paid. 2 *P. Will.* 335.

IV. *Of the custom of the province of* York.

By the statute of distribution 22 & 23 *C.*2. *c.* 10. it is provided that the said act, or any thing therein contained, shall not any [453] ways prejudice or hinder the customs observed within *the city of London*, or within *the province of York*, or other places, having known and received customs peculiar to them, but that the same customs may be observed as formerly; any thing therein contained to the contrary notwithstanding. § 4.

And by the 1 *J.*2. *c.* 17. For the determining some doubts arising upon the said statute, it is hereby enacted and declared, that the clause therein by which it is provided, that the same statute or any thing therein contained, should not any ways prejudice or hinder the customs observed within *the city of London* and *province of York*, was never intended, nor shall be taken or construed to extend to such part of any intestate's estate as any administrator, *by virtue only of being administrator*, by pretence or reason of any custom, may claim to have to exempt the same from distribution; but that such part in the hands of such administrator shall be subject to distribution as in other cases within the said statute. § 8.

By virtue only of being administrator] [As the custom of York does not extend to the *testamentary part* of the personal estate,] that part which the administrator hath by virtue only of his being administrator, is *the dead man's part;* which being taken out of the custom, this statute of the 1 *J.*2. *c.* 17. provides that the same shall be distributed according to the statute of distribution.

And agreeable hereunto was the case of *Stapleton* and *Sherrard*, Feb. 5th, in the 3 *J.* 2. (4) which cause was depending when this statute was made; Between John Stapleton, esquire, and Thomas lord Meryon, plaintiffs; Bennet Sherrard, esquire, and Dorothy his wife, administratrix of the goods of Robert Stapleton, esquire, defendants. —— This cause having been first heard on the 13th day of June in the 35th of Charles 2., and it being then referred

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(4) *H.* 1684. 1 *Ves.* 305. 314. 432.

to a master to take an account of the personal estate of the said Robert Stapleton, and to make exact distribution of the same according to law, amongst the plaintiff Stapleton, and the child of the lord Meryon, and also the brothers and sisters of the said Robert Stapleton, as well those of the whole blood, as of the half blood, and their respective representatives; the defendant, in right of the defendant Dorothy, as she is widow of the said intestate Robert Stapleton, claiming a moiety of the clear personal estate by the custom of the province of York, and also by the late act for settling intestates' estates, half of the other moiety thereof; and the said master being thereby to report specially to this court, as he should think fit, what should appear doubtful as to the interest of any of the parties concerned therein, the said [454] master made his report, dated the 9th day of June, 1684, whereby he certified, that by the custom of the province of York, a moiety of the said clear personal estate was of right due and belonging to the defendant Dorothy, as the widow and relict of the said Robert Stapleton, and that the other moiety he had divided amongst the said intestate's brothers and sisters, and their legal representatives, in such proportions as is therein mentioned. And exceptions having been put in to the said report, and the same coming to be heard the 24th day of February in the first year of king James the Second, before the right honourable the lord keeper of the great seal of England; his lordship desired his grace the then lord archbishop of York to certify, when a man dies intestate within the province of York without issue (after his debts and funeral expences paid,) how the residue was to be divided by the custom of the province of York, and what part remained by the ordinary to be distributed. And his grace the then archbishop of York having, pursuant to the said desire, on the 18th day of March in the first year of James the Second, certified, that in such cases aforesaid, the widow of the intestate by the custom of the said province hath usually had allotted to her one moiety of the clear personal estate, and that the other moiety had been distributed amongst the next of kin to the deceased intestate, and that had been the constant practice of the ecclesiastical court at York. To which certificate the said defendants took exceptions. Upon debate whereof on the 17th of May in the said first year of James the Second, it was ordered, that the exceptions should be overruled; and the defendants were ordered to pay unto the plaintiffs, and bring into court respectively, the several and respective sums of money therein in that behalf mentioned within two months; or in default thereof, or if the plaintiffs should not acquiesce therein, then they were to pay costs. And the defendants being not satisfied with the said order, did afterwards petition the right honourable the lord high chancellor of England for a rehearing of the said cause, upon this point only, namely,

whether the defendant Dorothy, being the widow of the said Robert Stapleton, who died an inhabitant of the province of York, and without issue, and also his administratrix, ought not by virtue of the custom of the said province to have one moiety, or half of the clear personal estate of the said intestate Robert Stapleton her late husband, and also according to the rules of distribution [455] mentioned in the late act for settling intestates' estates, to have half of the other moiety as widow of the said Robert Stapleton, who died without issue as aforesaid. And his lordship having ordered the said cause to be reheard upon that point only, and the same coming to be reheard accordingly before his lordship in the presence of the defendant's counsel, none attending for the plaintiffs, albeit due notice of the said last order for rehearing was given to them and the other parties concerned, as by affidavit then produced did appear; and the case on the pleadings in the cause being opened by the defendant's counsel, and upon consideration thereof, and of the said late act for settling of intestates' estates, and of the statute made in the first year of his said majesty king James the Second, intitled, an act for reviving and continuing several acts of parliament therein mentioned; his lordship declared, that notwithstanding the said certificate of the said lord archbishop of York, his lordship was fully satisfied, the defendant in right of the defendant Dorothy, as widow of the said intestate Robert Stapleton her late husband, ought to have the one moiety or half of his clear personal estate by virtue of the custom of the province of York, and also half of the other moiety of the said clear personal estate by virtue of the said statute and rules of distribution therein mentioned: and did order and decree the same accordingly. And it being alleged, that the defendants in pursuance of the said former decree, and to avoid any contempt for not yielding obedience thereto, had paid and satisfied unto the plaintiffs and others, the brothers and sisters of the said intestate Robert Stapleton, or their respective representatives, or some of them, the respective proportions to them respectively allotted by the master's report, whereas they ought but to have paid one moiety thereof, and prayed that the plaintiffs and the said other persons that were so over-paid, might refund and pay the defendants the moiety or half of the money so paid or satisfied unto them, his lordship did order and decree the same accordingly, and the 5*l.* deposited with the register, upon the granting of the said rehearing, to be paid back to the defendants, or their clerks in court. Afterwards on the 8th day of June, in the third year of the reign of his said majesty king James the Second, the plaintiffs being dissatisfied with the said order made, petitioned his lordship to hear the cause again; and the same coming to be reheard accordingly on the 5th day of February in the year aforesaid, before his lordship, in the presence of counsel learned

on both sides, upon long debate of the matter, and hearing what could be alleged on either side, his lordship declared the defendant's wife is well intitled to one moiety of her late husband's estate by the custom of the province of York, [*Swinb.* 220., *infra*, 458. (2)] and to a moiety of the other moiety by the act of distribution, [22 & 23 *Car.* 2. *c.* 10. § 6.] and therefore saw no cause to alter the former order; and therefore did order, that the said former order should stand confirmed.

[Power given to inhabitants of province of York to make wills.]

By the 4 *W. c.* 2. [*A. D.* 1692.] Whereas by custom within *the province of York*, or other usage, the widows and younger children of persons dying inhabitants of that province, are intitled to a part of the goods and chattels of their late husbands and fathers, (called her and their *reasonable part*,) notwithstanding any disposition of the same by their husbands' and fathers' last wills and testaments (5), and notwithstanding any jointures made for the livelihood of the said widows by their husbands in their lifetime, which are competent, and according to agreement; whereby many persons are disabled from making sufficient provision for their young children: for remedy thereof, it is enacted, that it shall be lawful for any person inhabiting or residing, or who shall have any goods or chattels within *the province of York*, by their last wills and testaments to give, bequeath, and dispose of all and singular their goods, chattels, debts, and other personal estate, to their executors, or such other persons as they shall think fit, in as ample manner as by the laws and statutes of this realm any person may give and dispose of the same within *the province of Canterbury* or elsewhere; and the widows, children, and other the kindred of such testator, shall be barred to claim or demand any part of the goods, chattels, or other personal estate of such testator, in any other manner than as by the said last wills and testaments is limited and appointed. § 1, 2. Provided, that nothing in this act shall extend to *the citizens of the cities of York and Chester*, who shall be freemen of the said respective cities, inhabiting therein or within the suburbs thereof at the time of their death; but that every such citizen's widow and children shall have such reasonable part and proportion of the testator's personal estate, as they might have had by the custom of *the province of York* before the making of this act. § 3.

Note, the mentioning of the city of Chester here was a mistake; for this custom of the province of York did not extend to that

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(5) Thus in *North* v. *North*, cited in *Webb* v. *Webb*, (1689) 2 *Atk. Rep.* 110, 111., an inhabitant of the province of York made a will, and devised a moiety of his estate to his wife. It was adjudged that the widow should have three-fourths.

city, nor to any other part of the whole archdeaconry of Chester; and the reason is, because until the erection of the see of Chester, in the time of king Henry the eighth, that archdeaconry was not within the province of York, but was part of the diocese of Litchfield and Coventry within the province of Canterbury. And therefore afterwards, when this proviso was taken off by the
[457] statute here next following, with respect to the city of York, there was no need for any application to parliament to repeal the same proviso, in relation to the city of Chester. (6)

[Citizens of city of York may bequeath personalty by will.]

But as to *the city of York*, it is enacted by the 2 & 3 *An.* c. 5. as followeth: Whereas in the statute of the 4 *W.* c. 2. there is a proviso, that nothing in the said act contained should extend or be construed to extend to the *citizens of the cities of York and Chester*, who should be freemen of the said respective cities, inhabiting therein or within the suburbs thereof, at the time of their death; but that every such citizen's widow and children should have such reasonable part and proportion of the testator's personal estate, as they might have had by the custom of the province of York before the making of the said act: and whereas notwithstanding, the mayor and commonalty, on behalf of the inhabitants of the said city of York, have requested that the said proviso may be repealed, so that the freemen of the said city may have the benefit of the said act, as well as all other persons inhabiting within the said province; it is enacted, that the said proviso, so far as the same concerneth the citizens of the city of York, shall be and is hereby repealed; so that it shall and may be lawful for all and every *the citizens of the said city of York*, who shall be freemen of the said city, inhabiting therein, or within the suburbs thereof, at the time of their death, by their last wills and testaments, to give, bequeath, and dispose of their goods, chattels, debts, and other personal estates, to their executors or such other persons as they shall think fit, as any other persons inhabiting or residing within the said province of York may lawfully do by virtue of the said act; and that the widows, children, and other kindred of such testator, shall be barred to claim or demand any part of the goods, chattels, or other personal estate of the testator, in any other manner than as by the said last wills and testaments is appointed; any thing in the said act, or any other law, statute, or usage to the contrary notwithstanding.

So that the ancient law and custom restraining the inhabitants of the province of York from disposing of their whole personal estates by will, is now utterly abolished out of that whole province.

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(6) Chester not having been within the province of York at the time of the making it a bishop's see by Henry the eighth, is not within the custom. *Pickering* v. *Stamford*, *E.* 1797, 3 *Ves.* 338.

But with respect to the distribution of intestates' effects, the custom continues as it hath been for ages past; which, taking *Swinburne* for our guide, we come now to trace out and delineate. [Custom of province of York as to distribution of intestates' effects.]

It is to be understood then, that within the province of *York* generally, there hath been an ancient custom, and divers famous writers long ago have made mention of the said custom in their works to have been observed long before their days, and the [458] same also appeareth from the acts and other very ancient instruments of undoubted credit, faithfully preserved in the registry of the archbishop of *York;* by which custom there is due to the widow, and to the lawful children of every man, being an inhabitant or an householder within the said province of York, and dying *there or elsewhere* (7) intestate, being an inhabitant or householder within that province, a *reasonable part of his clear moveable goods; unless such child be heir to his father deceased; or were advanced by his father in his lifetime,* by which advancement it is to be understood, *that the father in his lifetime bestowed upon his child a competent portion whereon to live. Swin.* 220. 230. 233.

Reasonable part] which is as followeth:

(1) If the intestate hath *neither wife nor child,* at the time of his death, his whole personal estate (the funeral expences and other necessary charges being first deducted) shall be disposed in the due course of administration; the same heretofore having been wholly at the disposal of the deceased, and consequently falling now under the directions of the statute of distribution. *Swin.* 220.

(2) If the intestate at the time of his death leave behind him *a wife and no child,* or else some *child or children but no wife;* in this case, by the custom observed not only throughout the province of York, but in many other places besides within this realm of England, the goods are to be divided into two parts; of which one part is due to the wife, or else to the children, by virtue of the said custom. *Swin.* 220.

But if by settlement a jointure is limited to the wife, in bar of all her demands out of the personal estate of her husband by virtue of the custom, in such case it is as if there were no wife, with respect to the said customary part; so, if it is in bar of all her demands, by virtue of the said custom *or otherwise,* she shall be debarred also of any distributive share by the statute. 1 *Vern.* 15.

And if the intestate have a wife, and a child or children, which child is *heir* to the intestate, or which children were *advanced* by the father in his lifetime; in this case it is as if he had no child; and therefore in like manner the goods shall be divided into two

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(7) But see *Pickering* v. *Stamford, supra.*

parts, whereof the wife is to have the one part to herself, and the other half is distributable by the statute. *Swin.* 220, 221.

So in the case of *Goodwin* and *Ramsden*, *M.* 1683. The
[459] plaintiff exhibited a bill, to have an account, and her share of her father's personal estate, who died intestate. The defendant pleaded, that the estate in question lay within the province of *York*, and that the intestate died there, and that the plaintiff being one of his daughters was advanced by him in his lifetime; and that by the custom of the province of York, a daughter being once advanced by her father in his lifetime, was excluded from all further benefit of her father's personal estate. But in this case it appearing, that all the children of the intestate were advanced by him in his lifetime, and so the estate wholly exempted out of the custom, it ought to go now in a course of administration, and be distributed according to the act for settling intestates' estates; and thereupon the plea was overruled. 1 *Vern.* 200.

And in the case of *Collinson* and *Trotter*, *June* 24, 1727, Richard Collinson died intestate, leaving a widow, who was the present defendant, Anne Trotter; and an only child, Thomas Collinson, the plaintiff in this cause. Sir Joseph Jekyll, master of the rolls, directed two issues to be tried at York assizes: 1. Whether the defendant Anne Trotter, who was the widow, is entitled by the custom of the province of York to a moiety, or any and what part of the intestate's estate: 2. Whether the plaintiff, Thomas Collinson the infant, who is entitled to lands in fee-simple by descent, on the death of his said father, is by the custom of the said province entitled to any and what part of his said father's personal estate. These two issues were tried accordingly at the summer assizes following. And after long evidence given, the jury found, as to the first issue, that the wife is entitled by the said custom to a moiety of the intestate's personal estate; and, as to the second, that the son is excluded, by the descent of the fee-simple estate, from claiming any part of the personal estate by the said custom. And consequently, the widow would receive one half of the personal estate by the custom, and one third of the remaining half by the statute; so that taking the whole together, she would receive two-thirds of the said intestate's personal estate.

(3) If the intestate at the time of his death had *both a wife and also a child or children;* in this case the deceased's share is no more than the third part of the clear goods: for the said goods shall be divided into three parts; whereof the wife ought to have one part, the child or children another part, and the third part (which is called the death's part) is distributable by the statute. Yet so, as that the child or children be not *heir* to the intestate their father, or *advanced* by him in his lifetime: for then it is as

if there were no child; and consequently the goods of the deceased are to be divided into two parts, whereof the intestate's wife is to have the one part, and the other is distributable by the statute. And if the intestate have a wife, and children whereof one is *heir*, and another *advanced*, and some *not advanced* by their father in his lifetime; in this case the goods of the deceased shall be divided into three parts, whereof the wife shall have one, the child or children not advanced another, and the third (being the death's part) is distributable as aforesaid. *Swin.* 221.

But here ariseth a very important question, in case where a child hath received in his father's lifetime an advancement, not only sufficient to debar him of his customary part, but so large as to extend into, or to overbalance, what would be his proportionable share also of the dead-man's part; whether in this case such child shall receive any share of the dead-man's part, unless he will bring over into hotchpot in the said dead-man's part, so much of his said advancement as exceedeth his just proportion of the customary part. And concerning this, the opinions of learned men are various. Some hold, if a child is fully advanced, so as that his advancement doth exceed not only what would be his just proportion of the customary part, but of the dead-man's part likewise: that in such case he is excluded from any further share whatsoever of his father's personal estate, either by the custom, or by the statute. Others are of opinion, that whatsoever his advancement shall have been, so as to debar him of his customary part; yet that advancement shall have no consideration in the dead-man's part, but thereof he shall receive his full share without any retrospect to his preceding advancement. The former opinion is more agreeable to equity and reason; but whether it is consistent with the construction of the statutes, is the question. For this is a point respecting not the custom, but the acts of parliament: the custom itself in this case is clear enough; but it is questioned, how far the statutes do infringe the custom in this particular.

Before the statute of the 22 & 23 *C.* 2. the custom was this: The children received their own customary part and no more; and of this customary part a child fully advanced could have no share, the advancement being esteemed as a satisfaction for his filial portion: and no child could sue for any share of the dead-man's part; the same (according to its original institution) being to be disposed for the soul of the deceased. This statute left the custom entire. And the statute of the 1 *J.* 2. *c.* 17. doth not touch thereupon, further than to distribute the said dead-man's part. Nevertheless, in such distribution it is required that the children (exclusive of the heir at law as aforesaid) shall bring their respective advancements into hotchpot. But in this case, the advancement is supposed to be already sunk in the customary [461]

part; and consequently nothing remained to be brought over into the dead-man's part: and therefore (upon this supposition) a child, how largely soever advanced by his father in his lifetime, shall only thereby be excluded from receiving any further filial portion by the custom, but shall not be excluded from receiving a full distributive share of the dead-man's part by the statute.

And with this seemeth to accord the case of *Gudgeon* and *Ramsden*, *T.* 1692, which was thus: The intestate, being an inhabitant in the province of York, left issue a son and daughter only, and no widow. The daughter had a portion given her in marriage, in lieu and full satisfaction of what she might claim by the custom of the province. The son was also advanced, by a settlement of lands. The question was, how this estate should be distributed. For the heir it was insisted, that now the custom of the province of York is to be quite laid out of the case, and the same distribution made of the estate, as of any other intestate's estate, and by consequence the daughter to bring her portion into hotchpot; but the heir to have a full share, without regard to what lands had been settled upon him. By the court: the daughter must not bring back her portion into hotchpot; for that came in lieu of the customary part, and was as the price the father thought fit to give her for the same. 2 *Vern.* 274. [*Eq. Ca. Ab.* 161. *pl.* 5, S. C.]

But here it seemeth, that a distinction ought to be made between an advancement given and accepted expressly in lieu and satisfaction of the filial portion, and an advancement given generally without any such agreement or stipulation. In the former case it seemeth, that no respect shall be had of such advancement in the distribution of the dead-man's part, the same being to be considered not so properly an advancement by the father, as a purchase by the child; and which, by possibility, might have fallen short of, as well as exceeded, the true value of the child's
[462] portion. (x) And upon this principle, the said case of *Gudgeon*

(x) For a child of age, for a valuable consideration, might release his future filial portion. [See *ante*, 448.] Of which kind of release there seems to have been a special precise form, according to the following example, which is brief, and yet full withal and comprehensive; much in the style and manner of those most accurate forms of composition, the writs in the register, *viz.* "*Be it known unto all men by these presents, That I* Thomas Whitehead *of* Byebeck *in the county of* Westmorland, *husbandman, for and in consideration of a sum of money, by* Richard Whitehead *my father, of* Byebeck *aforesaid in the said county, yeoman, to me well and truly contented and paid, have remised, released, and quit-claimed, and by these presents do absolutely remit, release, and quit-claim, unto the said* Richard Whitehead *my father, his executors and administrators, all manner of filial or* child's portion *of goods, which I the said* Thomas, *my exe-*

and *Ramsden* seemeth to have been determined. But where there is no such special contract or agreement, but the advancement is general, without any particular respect either to the customary or distributive share; it seemeth, that the same shall be applied either to one or both of them, according to the amount of such advancement, and so as best to answer the intent of the statute, which expresseth that *the estate of all the said children shall be made equal as near as can be estimated.* And by this distinction, the two contrary opinions seem to be reconciled.

Of his clear moveable goods.] Where the wife or children ought to have a rateable part of the goods of the deceased, be it a [463] third part or half, as the case yieldeth; there also they ought to have a like part of the *debts* due unto the intestate, after they be recovered by the administrator; for then they are numbered or accounted amongst the goods of the intestate, but not before. *Swin.* 221.

But of *leases* (*Swinburne* says) the wife and children cannot have any rateable part within the province of York, or other places where they have been accustomed to have their rateable part of the moveable goods and debts recovered, unless the said wife or children, demanding their rateable part of leases, do prove that by special custom of that place, (namely, of that city, county, deanry, or parish where the intestate dwelled, and had such leases,) the wives and children were accustomed to have their rateable part, as well of the leases as of the moveable goods of the intestate; which special custom being proved, they may recover the rateable part as before. (But not by the general custom of the province.) *Swin.* 221.

But concerning estates *pur autre vie*, that is to say, estates held by lease during the life of another person, it is specially

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cutors or assigns, can or may hereafter have, claim, or demand of, in, and to the goods or chattels of the said Richard Whitehead, *by any manner of ways, means, title, or claim howsoever. In witness whereof, I the said* Thomas Whitehead *have hereunto set my seal, the first day of* May, *in the eighth year of the reign of our sovereign lord* James, *by the grace of God, king of* England, France, *and* Ireland, *defender of the faith, and so forth, and of* Scotland *the forty-third*, 1610.

Sealed and delivered
in the presence of us, Thomas Whitehead.
George Sharp.
Edward Branthwaite.
Thomas Potter.
Philip Winster."

And here it is observable, that the particular sum, which was the consideration, is not specified; so that there is no room here to dispute about the *quantum* of the advancement: for it must be taken in such case as an advancement *in toto. Burn.*

provided by the statute of the 14 G. 2. c. 20. that where there is no devise thereof, they shall go and be distributed in the same manner as the personal estate of the intestate.

Unless such child be heir to his father deceased.] Which limitation is diversely extended; as,

(1.) Not only the heir of lands holden in fee-simple is thereby barred from the recovery of a filial portion, but he also that is heir in fee-tail, either general or special. *Swin.* 231.

(2.) Albeit the lands be of very small revenue, peradventure not past a noble yearly rent, and the goods very great in comparison of so small a rent (be it 1000*l.* or more); even in this case the heir is barred from the hope of a filial portion. And though this may seem hard to the heir, if we consider that same right of primogeniture; yet if we shall consider on the other side, that if the lands be worth 1000*l.* a-year, and the goods little or nothing worth (the debts being paid), and so little or nothing left to the rest of the children (which case is more frequent than the former); the custom we see is not void of equity, when both cases are equally balanced. *Swin.* 232.

(3.) Not only that heir is excluded from a filial portion which
[464] doth enter upon the lands immediately after his father's death, but he also which is heir in reversion is heir; and being heir can have no filial portion. For in the writ *de rationabili parte bonorum*, it is contained, that he which demandeth a filial portion *neither is heir nor was advanced in the life of his father:* now he that is heir in reversion cannot say so, and therefore can recover no filial portion according to the custom of the country. Otherwise, if he should recover a portion, and the land afterwards; the final intent of the custom should suffer prejudice, which would that the lands and goods should not go both one way, but the one to the heir and the other to the rest of the children. And yet the case may fall out very hard with the heir in reversion, for what if he should die in the mean time, before he could lawfully enter to those lands which be his only in reversion, and so reap no benefit either of his father's lands or goods. Howsoever it shall fall out, he must be content with his lot; and though not he, yet his shall enjoy the land at the time appointed. *Swin.* 232.

(4.) Albeit the heir received the lands by settlement made upon his father's marriage; yet he is heir so as to be excluded thereby from a filial portion. As in the case of *Constable* and *Constable*, *T.* 1700. Upon a former hearing of this cause, a question arising upon the custom of the province of York, touching the distribution of the personal estate of the father; an issue was directed to be tried at law, whether the father having by settlement on his marriage settled his real estate to himself for life, part to his wife for her jointure, and the remainder of the

whole to his *first* and other sons in tail, remainder to his own right heirs, the eldest son was thereby excluded by the custom of the province of York, from having any share of his father's personal estate; and it being found that he was thereby debarred and excluded, and the cause coming now to be heard on the equity reserved, it was decreed accordingly. 2 *Vern.* 375.

(5.) Albeit the heir hold lands by deed or feoffment in mortgage, or with clause of redemption, that is to say, upon condition that if the feoffor pay unto him a sum of money at a certain day, that then the feoffor may re-enter, and the deed or grant to be void; yet nevertheless in the mean time, until the condition be performed, and the land redeemed, if he should demand any filial portion, he is barred, because as yet he is heir to the deceased. But if the lands should be redeemed, and the money satisfied, then it is thought that he may recover a filial portion; because then he is not heir to the deceased, nor the advancement certain which was made by the father in his lifetime. [465] *Swin.* 232.

(6.) Likewise if a man purchase lands in fee, and by will devise the same lands to his eldest son and to the heirs of his body, and for default of such issue to his younger son and to the heirs of his body, and so on; in this case, *Swinburne* says, the eldest son is not barred from the recovery of a filial portion, as heir to the deceased; because he is not as heir to his father according to the course of the common law, but according to his father's will. *Swin.* 232. [But whether this devise shall bar him as an advancement is another question, which will be considered afterwards.]

But where a man is heir at law of lands in fee-simple, and his father also deviseth those lands to him; it seemeth that he shall take by his better title, as heir at law, and not as devisee: and consequently thereby shall be excluded from a filial portion. For no man can by his will make his heir a purchaser of a fee-simple; for the descent will take effect at the same time, and the elder title shall be preferred.

(7.) In like manner the youngest son, who is heir in *borough English*, seemeth not to be heir, so as thereby to be debarred from a filial portion; for he is not heir according to the course of the common law, but by a particular custom.

(8.) Note also, that if the child should have any *copyhold* land, after his father's death; in this case he is not reputed his father's heir to the effect aforesaid, and so barred from the recovery of a filial portion, due by the general custom of the said province. *Swin.* 232.

Note, the word *copyhold*, although of itself it conveys an idea distinct enough, yet from the different acceptation of it amongst learned men, it becometh equivocal; some using it to signify all

lands which are not freehold; others, more properly lands only which are holden by copy of court roll. It is of very much importance to determine in which of the two senses it is here to be understood; for a great part of the lands within the province of York are neither freehold nor copyhold, but are included under the word *customary.*

For *customary* is the general denomination of lands holden by the custom of the manor, of which *copyhold* is but one species; so that although all copyhold lands are customary, yet all customary lands are not copyhold. And it seemeth that the word
[466] *copyhold* here shall be understood in the less proper sense, so as to signify, that *customary* lands in general, as well as those which are strictly *copyhold*, inherited from the father, shall be no hindrance to the child from obtaining a filial portion. For at the time when this custom of the province of York took place, these customary lands were not inheritable.

Or were advanced by his father in his lifetime] Here it comes to be considered, what manner of preferment or advancement that is, which doth debar the child from a filial portion.

By his father] For if another than the father bestow any preferment or advancement, though never so much, this preferment by another is no bar to the child, from the recovery of the filial portion of his father's goods; much less, where the child hath advanced his estate by his own industry. *Swin.* 233.

In his lifetime] Here the case aforesaid is considerable, where the father by his last will deviseth lands to his son (for this he may well do, and yet nevertheless die intestate as to his goods), whether this shall be such an advancement as shall debar the son from the recovery of his filial portion; and it seemeth that it shall not: for this was no advancement to the child in the lifetime of his father; but he may refuse or waive the bequest, and recover a filial portion due according to the custom of the country. *Swin.* 233.

Howbeit, if the father in his lifetime bestow a lease upon his child, or grant unto him an annuity for life out of his lands, yet in such manner as the child shall not reap any benefit thereby, so long as the father liveth, but after his death; this is holden for a preferment or an advancement, because it was assured (8) unto him in his father's lifetime. Nor is this case contrary to the former; for the child had no assurance of his devise until his father was dead, because he might have revoked (8) the same at any time whilst he lived, which he could not do in the other case. *Swin.* 233.

That the father in his lifetime bestowed upon his child] For if the father bestow any thing upon another for his child's sake, or

(8) See *Swinb. ed.* 7. p. 336. in next *note.*

for the good of his child; nevertheless this is no such preferment as will hinder the child of his filial portion. *Swin.* 233.

And therefore if the father bestow any thing upon a man of trade, to take his son for an apprentice, and to teach him his mystery; this is no advancement to the effect aforesaid. *Swin.* 233.

Or if he bestow any thing upon a schoolmaster, or tutor in the university, for the increase of his knowledge in learning, or for any degree there to be obtained; this is no advancement to exclude the child of a filial portion. *Swin.* 233. [467]

No more is it (saith Swinburne) if the father buy the advowson of an ecclesiastical benefice or dignity, and afterwards present his son thereto. *Swin.* 233.

So if the father buy an office, and bestow it upon his son; this seemeth (he says) not to be an advancement to bar him of his portion. *Swin.* 233.

Or if the son be much indebted, and the father discharge the debt; yet this seemeth not to be a preferment. *Swin.* 233.

But if the father bestow a competent portion with his daughter in marriage, upon him that shall marry her; this, without question, is such an advancement as will bar her from the demand of a filial portion. *Swin.* 233.

A competent portion] By the word *portion* is to be understood, not only a sum of money, or part of the father's goods and chattels, but also lands and annuities bestowed by the father upon the son. *Swin.* 234.

Competent] Competent signifieth equal, or not far inferior, to that quantity which otherwise according to the custom of the province should fall to be due to the child, after the rate and proportion of the father's estate, at the time when he doth bestow any such thing upon his child; for the same being equal, or not much under the rate which should belong to the child by the custom aforesaid, if his father had then died, shall stand for a sufficient preferment and advancement, to exclude him from a filial portion. (9) For considering the equality, or small inequa-

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(9) *Twisden* v. *Twisden*, *E.* 1804, 9 *Ves. jun.* 425. According to the custom of York, a child cannot take a share in the customary part who has been advanced in the lifetime of the deceased. Those are the words of the custom and of the writ *de rationabili parte*, not merely in the ordinary sense, but the child could not bring his advancement into hotchpot so as to take a share of the customary part; for if the father, twenty years before his death, had given to that child by deed, or to take at his death, *500l.*, which sum was a competent portion of the father's assets at that time, though by a subsequent increase it turns out at his death to be a very small part, still it bars the child from any part of the customary estate. But *Swinburne* (*ed.* 7. p. 336.) expresses, that it must be by some act that assures and confirms it in his lifetime; and that which is revocable, *viz.* by

lity, betwixt the one and the other; it is to be presumed, that it was the father's purpose, that the one should stand instead of the other. Insomuch that if the father after this preferment should live many years, and increase his substance; yet it seemeth, that the father's former gift would bar the child from recovery of any farther filial portion: and the reason is, because as the father did grow richer (in which case the son's preferment should be less), so it might fall out that the father might have grown poorer, and then the son's preferment should have been more than otherwise it would by the custom of the country. So that the father's gift being at the first competent, in regard of his estate at that time;
[468] the same is not made effectual or ineffectual by the increase or decrease of his future estate. *Swin.* 233, 234.

But if the father's gift were not competent, or far under the rate of that which otherwise should belong to the child by the custom; as, for instance, if the father should give his child 5*l.* to put in his purse to bestow at his pleasure, whereas otherwise his filial portion would extend to divers hundreds; this gift of the father doth not seem to be such an advancement as will exclude the child from his filial portion, neither in the construction of law, nor in the intention of the father; and that is rather to be termed a mere benevolence, than a preferment or advancement exclusive of a filial portion: and if the son have deserved a good turn at his father's hands, this is no advancement, but a recompence of that which was formerly deserved. *Swin.* 234.

But here ariseth a question; What if the thing which the father bestoweth upon the child, be so indifferent between competent and incompetent, that it may be justly doubted whether the same shall stand for an advancement, or a mere benevolence, over and besides which he might expect a filial portion? Now whether may the child cast in that gift of the father, and so recover an equal portion with the rest of his brethren and sisters? It seemeth at the first that he may. For if a man seised of thirty acres of land in fee-simple, have issue two daughters, and giveth with one of them in marriage ten acres of the same land in frank

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will, is not, within the custom or the writ, an advancement in the life of the party, because it is always revocable, and not in his lifetime assured and secured to the child: and that is confirmed by this, that it does not appear to have been ever contended on a will, where the child took real or personal estate by disposition of the testator, and there was an intestacy as to the residue, that the child could not take a share of that, without bringing into hotchpot what he took under the will. If the law is, that what is to be taken under a will is not an advancement in the life of the party, it is very difficult to say that what is taken under an intestacy shall be an advancement; and though it is true the will must be made in the life, it is equally true nothing is advanced or given to the party to take till after the death. See lord *King*'s observations, 471. *n.* 1.

marriage, and died seised of the other twenty acres; she that is thus married may (if she will) have part of the twenty acres, whereof her father died seised; but then she must put her land given in frank marriage in hotchpot, that is to say, she must refuse to take the sole profits of the land given in frank marriage, and suffer the land to be commixed and mingled together with the other land whereof her father died seised, so that an equal division be made of the whole, betwixt her and her sister; and thus, for her ten acres, she shall have fifteen: whereas otherwise, her sister shall have the twenty acres of which their father died seised. And as in lands, so in goods; which is also agreeable to the civil law. And Swinburne says, he hath seen it sometimes so observed, by the consent of the children not advanced, being then of lawful years; but he hath not known it at any time so over-ruled by law, without their consents. And therefore he concludeth, that considering the strictness of the writ *de rationabili parte bonorum,* this gift of the father shall either be found to be a [469] preferment or not; if it shall be a found to be a preferment, then is the child excluded from recovery of a filial portion; if it shall be found not to be a preferment, then may the child recover the filial portion according to the custom of the province of York, as in the said writ is contained. *Swin.* 235.

But nevertheless, the words of the writ do not seem necessarily to infer this consequence, being only general, that *children not promoted in their father's lifetime ought to have their reasonable part:* for this they may have, and yet notwithstanding be required to bring into hotchpot with their brothers and sisters what they shall have received less than their due proportion; and it will be so much the more *reasonable* upon that account. And therefore what Swinburne intimates was in his days recommended to the parties by the judge, seemeth, at least since that time, generally to have prevailed as the custom of the province; that children (exclusive of the heir at law) not advanced to their full proportion of the children's part, shall be admitted to come in for their share of the said children's part, bringing thereunto their partial advancements into hotchpot: agreeable to what Swinburne acknowledgeth to be the rule of the civil law; in conformity also to the custom of the city of London, and to the measures of the statute of distribution, and to the rules observed by the courts of equity in all such like cases.

Whereon to live] If the father bestow any thing upon his child to any other end, as money in his purse to spend among his equals or to buy him suits of apparel, or books, or armour for the service of his country; yet this (as it seemeth) is not to be holden for an advancement, though peradventure the sums of money given for these particular ends were not very much inferior to that which otherwise might belong to the child for his

filial portion according to the custom, and otherwise would have been taken for an advancement; but it must be a provision of some competent thing for the maintenance of his child, whereby he may be the better enabled to live after his father's death. *Swin.* 234.

It is said by the editors or continuators of Swinburne, that it hath been much controverted, whether the ordinary hath power to compel the administrator to give portions to children, or to allot and distribute filial portions to the deceased's children out of his estate. If the ordinary attempt this, either before or after the
[470] granting of letters of administration, it hath been held, that the administrator might have a prohibition, and that the ordinary hath not any power to make distribution of the surplusage, nor to take any bond to answer the same; for that if the ordinary might distribute, then the administrator might be charged of his own goods; for there may be dormant debts, and which are unknown: yet notwithstanding, they add, that it is usual for the ordinary to order and allot distribution of filial portions, and therein prohibitions are not often granted. *Swin.* 233 a.

But whether this is spoken of the times before the statute of distribution, doth not appear. As to the dead-man's part, there seemeth to be no doubt, but the ordinary by the said statute may cause distribution thereof. And as to the widow's and children's portions, the statute provides that the custom shall be observed as before: and it seemeth that the ordinaries within the said province, even as all other ordinaries, before the making of the said act, did exercise a power of compelling distribution, although the temporal courts would not allow the same to be lawful, and that was the cause of the act being made. And the act says, that "*All ordinaries, as well the judges of the* "*prerogative courts of* Canterbury *and* York, *as other ordinaries*, "shall have power to order and make just and equal distri-"bution."

There is a case in 2 *Vern.* 47. 82. wherein the customs of the city of London and of the province of York did interfere; which was thus: *E.* 1688. *Chomley* and *Chomley*. A freeman of London died within the province of York, leaving a widow, and issue two sons and a daughter; and an estate of about 50*l.* a year within the province of York descended on the elder son; and if the custom of the province of York should prevail, he would thereby be excluded from having any share of the personalty, which was about 20,000*l.* A bill was brought for the direction of the court, how and in what manner the personal estate should be disposed of. And the court was clearly of opinion, that the deceased being a freeman of London, the custom of the city for the distribution of the personalty should prevail and controul the custom of the province of York; and

that notwithstanding the custom of the province to the contrary, the heir should come in for a share of the personal estate: for the custom of the province is only local, and circumscribed to a certain place; but that of London follows the person, though never so remote from the city. (1) [471]

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(1) In *Wheeler* v. *Sheer*, (1730) *Moseley's Rep.* 302—304. An inhabitant of the province of York bequeathed the residue of his personal estate to executors in trust, but appointed no trust, and gave them a legacy of 100*l.* each out of that residue, thus barring their right to the whole. *Ib.* (And see *Bagwell* v. *Dry*, 1 *P. Wms.* 700. *Graydon* v. *Hicks*, 2 *Atk.* 18.) A question then arose, whether the trust of the surplus belonged to the next of kin by the statute of distributions, or whether it was not subject to the custom of that province; as if sir George had died intestate, and so one moiety would go according to that custom, and the heir be excluded from his share, while the other went according to the statute of distributions? *Per* lord chancellor *King:* " This is a new case; by law the executor is entitled to the whole personal estate, which is as old as the custom which is the law of that part of the kingdom, and which the statute takes away only where there is a will. If one, then, makes a partial will, and no executor, the residue will be subject to the custom: but here are executors, and the residue of the personal estate is devised to them; so this case is within the express words of the statute 4 & 5 *W. & M.* *c.* 2. Then the question is, For whom the executors are to be trustees? Not for those who are to take by the custom, by the very letter of the statute; but for those who are entitled by the general law; and the testator devised the residue to put it out of the custom; so the distribution must be made to his next of kin.

But though the custom does not attach till the death of the testator, who has it in his power to control it, yet till he does so his personal estate must be considered as subject to the custom. This is not a case within the statute of distributions, though I have declared the surplus to be distributed among the next of kin according to that statute; but I only consider that statute as to the persons who are to take, but not so far as to disturb the provisions made by testator, either in his lifetime or by will." Therefore, the children advanced in testator's lifetime were not decreed to bring their shares into hotchpot.

Thus the statute of distributions appears not to extend to partial or constructive intestacies; for (*per* sir *W. Grant*) the provision in that statute, for bringing advances by way of settlement into hotchpot, applies only to *actual* intestacy: and where there is an executor, and consequently a complete will, though the executor may be declared a trustee for the next of kin, they take as if the residue had been *actually given* to them. Therefore a child advanced by his father in his lifetime cannot be called on to bring his share into hotchpot. *Walton* v. *Walton*, (1807) 14 *Ves. j.* 324. The following argument in support of lord *Bathurst*'s decree in *Lawson* v. *Lawson* (reversed in *Dom. Proc.* on *another* ground, (1777) 7 *Bro.* P. C. 517. 4 *Tomk.* P. C. 23.) goes to support the position that where there is a will and an executor appointed, the custom is excluded, and the

[Distribution of intestate's effects in

UPON the whole, so far as can be estimated from the premises, the course of distribution of intestate's effects within the province of York seemeth to stand thus:

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next of kin take according to the rules of the statute of distributions, except as to bringing into hotchpot.

Where a man makes an executor, the whole personal estate vests in him; and as there is nothing left for the custom to operate upon, the whole becomes testamentary. Now, in the present case, the testator having made an executrix, had died testate as to the whole, so that the whole became the testamentary or dead-man's share, since by the statute he had a right to bequeath the whole. Nothing, therefore, being left for the custom to operate on, and there being in equity a resulting trust of the surplus, the court had properly decreed a distribution of it according to the general law of the land (the custom being excluded); namely, to those to whom before the statute the dead-man's share would have gone; and *Beard* and *Beard* (1744), 3 *Atk.* 73.* in fact *confirms* the doctrine; for there the court held the will revoked by the posterior deed poll as to all the personalty, and decreed distribution as if no will or deed had been made. The general law of the land must therefore take place on the resulting trust; for if the widow was now to set up the custom, she would claim against the statute in other manner than the will has appointed, which had devised away the whole, and taken it out of the custom; and equity will not therefore restore the operation of the custom against the statute.

In *Cooper* v. *Scott*, 3 *P. Wms.* 119., the decree proceeds on the principle, that the lapsed share of the residue was to go according to the statute of distributions, though the testator was a citizen of London.

The above authorities decide, that where an executor is declared to be a trustee of the residue for the next of kin, though they take it in other respects as they would do under the statute of distributions, except as to bringing into hotchpot, yet they are not called on to bring any prior advancement into hotchpot. The principle of them has been doubted by a most eminent equity counsel, on the ground, that a residue undisposed of by will of an inhabitant of the province of York ought to be divided according to that custom, which was the *lex loci*. And he could not conceive how the stat. 4 & 5 *W.* & *M.* c. 2., which was only intended to enable persons to dispose of their estates by will, could operate to bar the widow and children of their customary shares when no effectual disposition is made, and the only question is, Whether, as the executor is a trustee, he is trustee for those who would have taken it by the custom if there had been no will, or those to whom the law gives it in case of an actual intestacy in those places where no custom prevails. And the opinion of lord *Hardwicke*, in *Beard* v. *Beard*, *supra*, in the case of a citizen of London, is expressly founded on this principle. He observed,

* In this case, of a partial intestacy of a freeman of London, lord *Hardwicke* held, that as there was no difference in law between an absolute and qualified intestacy, the executor who, from a qualified intestacy, becomes a trustee, must distribute according to the custom of the city of London.

1. If a person dieth intestate, leaving no wife, but *an only child*, which child is *heir at law*, or *advanced* or *partly advanced*, or *not advanced:* in all these cases, it maketh no difference; for one way or other such child shall have the whole clear personal estate. For supposing such child to be *heir at law*, he shall have nothing by the custom, but by the statute he shall have the whole as next of kindred. If he is *advanced*, he shall likewise have nothing by the custom, but by the statute in like manner he shall have the whole. If he is *partly advanced*, he shall have one half by the custom, there being no other child with whom to bring his partial advancement into hotchpot, and the other half by the statute. So in like manner, if he is *not at all advanced*, he shall have one half by the custom, and the other half by the statute. the province of York.]

2. If such person hath *divers children, one of whom is heir at law, and the others are advanced:* in this case, with respect to the custom, it is as if he had no children: none of them can claim any thing by the custom; and (the younger children being supposed to be fully advanced) the heir at law by the statute shall have the whole.

3. If such person hath *divers children, the first of which is heir at law, the second advanced, the third partly advanced, and the fourth not advanced:* in this case, the child *partly advanced* and the child not *advanced* shall have one half equally betwixt them by the custom, the child partly advanced first thereunto bringing his partial advancement into hotchpot; and the other half (which is the dead-man's part) shall be distributed by the statute, equally amongst all the said children (the second only excepted, who is supposed to be fully advanced already) share and share alike. But if the heir at law hath been advanced by his father, otherwise than by lands, or as heir at law; he shall bring such his advancement into hotchpot with his brothers and sisters, otherwise he shall have no distributive share by the statute.

And note, that the representatives of children dead are admitted by the statute to a distributive share of the dead-man's part, in the place of the deceased child or children whom they represent; but not so of the customary part, by the custom.

4. If a man hath *a wife and no child*, she shall have (besides her convenient bed and apparel) one half by the custom, and the other half (being the dead-man's part) shall be distributed by the statute; of which dead-man's part by the said statute she shall have one-half, and the other half shall go to the next of kindred to the deceased in equal degree: so that, dividing [472]

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however, that the above decisions, if right, strongly support the position, that in cases of partial intestacy the statute of distributions, and not the custom, must prevail in the distribution.

the same into four, she shall have three, and they shall have one.

But if, although there be no child, yet there hath been a child, and there are any legal representatives of such child deceased; then of the dead-man's part by the said statute the wife shall have but one-third, and the said representatives shall have the other two-thirds: so that, dividing the whole into six parts, she shall have four, and they shall have two.

5. If a man hath *a wife and also a child or children, one of which children is heir at law, and the others are advanced*: in this case, with respect to the custom, it is the same as if he had no child; and consequently the wife shall have one half by the custom, and the other half (being the dead-man's part) shall be distributed by the statute; of which dead-man's part by the said statute she shall have one-third, and the other two-thirds shall go to the heir at law as aforesaid; so that, dividing the whole into six parts, she shall have four, and he shall have two.

6. If a man hath *a wife and also a child or children, any one or more of which children are not advanced*: by the custom she shall have one-third part, and the children not advanced shall have another third part, and the remaining third part (being the dead man's part) shall be distributed by the statute: of which dead-man's part by the said statute she shall have one-third, and the other two-thirds shall be distributed amongst the children in manner as is aforesaid: so that, dividing the whole into nine, she shall have four, and they shall have five.

As for example: a man inhabiting within the province of York dieth intestate, leaving a clear personalty of 9000*l.*; and leaving a widow and four children. The first being heir at law to freehold lands, and having received likewise of his father in his lifetime 400*l.* to set him up in trade; the second advanced (2), to the amount of 3000*l.*; the third party advanced, to the amount of 600*l.*; and the fourth not at all advanced. The question is, how this personalty shall be distributed? First of all; the widow shall have one-third part by the custom, as her widow's
[473] portion, to wit, 3000*l.* Another third part, by the said custom, shall be distributed amongst the children; of which, the heir at law (as such) by the said custom is excluded from receiving any share; the second son also, as being fully advanced, is excluded; but hereunto the third son shall bring his partial advancement of 600*l.* into hotchpot, and then the third and fourth sons shall divide the 3600*l.* equally between them; but the real benefit thereof to the third son will be but 1200*l.*; and to the fourth son 1800*l.* The remaining third part of the said personalty,

(2) As it cannot be gathered from this statement what the father was worth at the time that he advanced his children, the question arises, whether the advancement was *competent* or *partial*.

which is the dead-man's part, shall be distributed by the statute; of which, by the said statute, the widow shall have one-third, to wit, 1000*l.*; and the residue, being 2000*l.*, shall be distributed equally amongst the said three children, namely, the heir at law and the third and fourth sons (the heir at law being let in for so much by the statute); and the second son being still excluded, as having received more than his just proportion of his father's whole personal estate: but hereunto the heir at law shall first bring his partial advancement of 400*l.* into hotchpot, and so the said three children shall divide the whole 2400*l.* equally amongst them; but the real benefit thereof to the heir at law will be but 400*l.*, and to the said two youngest children 800*l.* each. So that of the whole clear personalty of 9000*l.* the widow shall receive - - - - - - - - 4000*l.*

The heir at law - - - - - -	400*l.*
The second child - - - - - -	000*l.*
The third child - - - - - -	2000*l.*
The fourth child - - - - - -	2600*l.*
Total	9000*l.*

7. *If a person dieth intestate, leaving neither wife nor child, but a father living;* the same is out of the custom, and (supposing there is no representative of any child deceased) then the father, by the statute, as next of kindred, shall have the whole.

But if, although there be no child, yet there hath been a child, and such child deceased hath left any child or other descendant; then such representative of the child deceased shall receive the whole, in exclusion of the father.

8. If the deceased leaveth *neither wife nor child* (*nor representative of such child as aforesaid*), *nor father, but a mother living;* the same also is out of the custom, and by the statute of the 1 *J.* 2. c. 17. every brother and sister, and the representatives of them, [474] shall have an equal share with the mother. If there be no brother nor sister, nor representative of any of them, then by the statute of distribution the mother shall have the whole, as next of kindred.

9. If the deceased leaveth *neither wife nor child* (*nor representative of such child as aforesaid*), *nor father, nor mother; but leaveth brothers and sisters, and children of other brothers and sisters deceased;* this case is also out of the custom; and by the statute, the brothers and sisters, and the children of the brothers and sisters deceased, shall take *per stirpes*, and not *per capita;* for the children of the deceased, being not equal in degree with their uncles and aunts, do take in this case not in their own right, but by way of representation of their parents deceased.

10. But if a person dieth intestate, leaving *neither wife nor child (nor representative of such child as aforesaid), nor father nor mother, nor brother nor sister, but children of brothers and sisters;* in this case by the statute they shall all take equally *per capita*, and not *per stirpes*, because they do not come in by the right of representation, but all as next of kindred in equal degree.

11. If a person dieth intestate, leaving neither *wife nor child, nor representative of such child, nor father nor mother, nor brother nor sister, nor representative of brother or sister, but hath a grandfather or grandmother living;* such grandfather or grandmother shall come in before uncles and aunts by the statute, as next of kindred to the deceased.

12. If a person dieth intestate, leaving *neither wife nor child, nor representative of such child, nor father nor mother, nor brother nor sister, nor representative of brother or sister, nor grandfather nor grandmother, but uncles or aunts, and children of uncles or aunts deceased:* these children are amongst collaterals, and out of the statute in the right of representation, and shall take nothing; but the surviving uncles and aunts shall have the whole as next of kindred.

13. If a person dieth intestate, leaving *none of these relations;* the general rule by the statute is, that the same shall go to the next of kindred in equal degree.

14. If such person hath *no kindred*, it is out both of the custom and the statute; and the same shall escheat to the king, or to the lord of the manor or other to whom the king hath granted it: for where no person can claim any property, there the king shall be intitled by his prerogative.

[475] FINALLY, To all that hath been said upon this abstruse subject, it may afford some light to set forth what is the law of SCOTLAND in this particular; especially as the whole kingdom of Scotland, when this custom of the province of York took place, was within and a part of that province. Now the law of Scotland, with regard to wills, continues to this day, as it was in England within the said province before the statute of the 4 *W. c.* 2., viz. that the widow and children shall have a portion out of the personalty, which the husband or father cannot devise from them; and which in both places alike, the law still gives to them in case of intestacy. And the general proportions are the same in both places; only there is some difference in distributing the children's portion amongst themselves, wherein the Scotch regulations incline more to the principle of equality, agreeable to what is one of the chief objects of our statute of distribution. Briefly, the law of Scotland is this: if a man dies, leaving a widow and no child, his whole clear personal estate, otherwise called *free gear*, divides into two; one half goes to the widow, the other is the *dead's part*, that is, the absolute property of the deceased, of

which he can make his will, and which falls to his next of kin if he dies intestate. Where he leaves a child or children, but no widow, the children get one half of their *legitime*, legal portion, or *bairns' part of gear;* the other half is the dead's part, which falls also to the children, if he has not otherwise disposed of it by his will. If he leaves both widow and children, the division is tripartite; the wife takes one third by herself; another falls to the children, and the remaining third is the dead's part. If he leaves neither wife nor child: the goods suffer no division, but all is dead's part.

Hitherto the customs agree: but in dividing the children's portion amongst themselves, there is a difference; for whereas by the custom of the province of York, the heir at law, if his inheritance be never so small, is excluded from any share of the filial portion: on the contrary, in Scotland, if the heir finds it his interest to renounce his exclusive claim to the inheritance, and betake himself to his share amongst the rest of the children, he may collate or communicate the inheritance with the other children, who in that case must collate the children's portion with him; so that the whole is thrown into one mass, and divided *in capita* amongst all of them. Upon which ground, if there is only one child, who is heir at law, he shall receive the children's [476] portion: because the law admits him to come in, where there are other children, on collating his inheritance.

And for the like reason, *Swinburne*'s notion of *advancement*, namely, that it shall be deemed either a full advancement, or else no advancement at all, so as to entitle a child either to an entire distributive share, or else wholly to exclude him, can here have no place. But in order to preserve an equality, a child who has received a provision from his father, be it more or less, shall be admitted, if he thinks it for his interest, to cast his provision into hotchpot, and receive his proportionable share of the dividend with the other children.

But if from the deed of provision, the father's intention shall evidently appear, to continue the receiver as a *bairn in the house;* the provision is interpreted to be granted as a *præcipuum*, without the necessity of collation. So also a child is not obliged to collate an estate in lands given to him by his father; because the children's portion is not impaired by such provision.

But no filial portion is due to children foris-familiated, that is to such as, by having renounced the filial portion, are no longer considered as *bairns of the family*, and so are excluded from any farther share of the personal estate than they have already received. But as the right of *legitime*, or children's portion, is strongly founded in nature, the renunciation of it is not to be inferred by implication; neither by the child's carrying on an employment by himself, nor by marriage, nor even by his ac-

cepting a provision from his father, unless it specially bear to be in satisfaction of his filial portion.

If he has renounced his share of the filial portion, it has the same effect in favour of the other children, intitled thereto, as if he were dead, and consequently the share of the renouncer divides amongst the rest: but he does not thereby lose his right to the dead's part, if he does not renounce his share in that likewise; nay, his renunciation of the filial portion, where he is the only younger child, has the effect to convert the whole subject thereof into dead's part, which will therefore fall to the renouncer himself, as next of kin, if the heir be not willing to collate the inheritance with him.

Also no *legitime* is due to grandchildren, upon the death of their grandfather: perhaps because the immediate father is presumed to have already received his just share out of the effects of the deceased.

[477] And this collation, or bringing into hotchpot, takes place only amongst children: so that the widow is not obliged to collate any thing that hath been given to her by her husband, in order to increase the children's portion; as, on the other hand, the children are not obliged to collate their provisions, in order to increase her share.

With regard to the dead-man's testamentary part, where he makes a will, and therein appoints an executor, and doth not otherwise dispose of the said testamentary part; if the executor nominated be a stranger, that is, one who has no legal interest in the personal estate, he is merely a trustee, accountable to the next of kin, but he may retain a third of the dead's part, for his trouble in executing the testament; in payment of which, any legacy that is left to him must be computed. The heir in like case, if he be named executor, has right to the third as a stranger. But if one be named who has an interest in the personalty, he has no allowance, unless such interest be less than a third.

As to the payment of debts, there are some which are called *privileged* debts; because they are preferable in payment to any other. Under which name are comprehended, medicines furnished to the deceased on his death-bed; physician's fees in that period; funeral charges, which include whatever is necessary for the decent performance of the funeral; the rent of his house; and his servants wages, for the year or term current at his death. As to the rest, all creditors who shall, within six months after the death of the debtor, enter a legal claim, shall be preferred *pari passu* with those who have done more early diligence; which prevents collusion, and confessing of judgments, in favour of some creditors, and to the exclusion of others. (*Erskine's Law of Scotland, Book* iii. *Tit.* 9.)

[A Table to shew at one view the distribution of an intestate's personal estate, according to the customs of the city of London and province of York, and the variance between the two customs. (*aa*)

By the 7 & 8 *W.* 3. *c.* 38. the intestate's property (after deducting for the widow her apparel, and the furniture of her bed-chamber, which in London is called the widow's chamber) was to be divided into three parts; one to the widow, one to children, and the other third to the administrator (commonly called the dead-man's part), which third was by the statute 1 *Jac.* 2. *c.* 17. declared to be subject to the statute of distributions. If the intestate, a freeman of the city of London, or an inhabitant or householder within the province of York, dies (there or elsewhere) worth (*ex gra.*) 1800*l.*, then his effects, after deducting for the widow her apparel and the furniture of her bed-chamber, shall be divided as follows:—

If the intestate leaves	*His personal representatives shall take in the proportions following:* —
A widow and two children,	The estate shall be divided into eighteen parts, the widow taking eight parts,—six by the custom, and two by the statute; the children five parts each, three by the custom, and two by the statute.
A widow and one child,	The widow eight parts as before, and the child ten,—six by the custom, and four by the statute.
A widow and no child,	The widow three-fourths, and the remaining fourth shall go by the statute to the next of kin. (3)
A widow provided for by jointure before marriage, in bar of her customary part only,	She shall have her share of the dead-man's part, under the statute of distributions, unless barred by special agreement.
A widow and child, or children, one or more of which are not fully advanced,	The widow one-third by the custom, and one-third by the statute: the children bringing theirs into hotch-pot, take equally, for the widow shall not bring into hotch-pot.

(*aa*) See 2 *Bridg. Dig.*, *tit.* Local Customs.

(3) The representatives of a child deceased are admitted by the statute to a distribution of the dead-man's part, in place of the deceased child, but not of the customary part, by the custom. In London, if a wife be divorced for adultery, she shall not have her customary share: so by reason in York.

If the intestate leaves	*His personal representatives shall take in the proportions following*: —
A widow (totally barred) and child,	The child the whole, one-half by the custom, one-half by the statute, the same as if there was no widow.
Several children, one heir at law, the others fully advanced,	None shall claim by the custom; and the younger children being fully advanced, the heir shall have the whole by the statute.
If neither wife nor child, but grandchildren,	It shall be distributed according to the statute; the custom not extending to them.
A widow and child, or children, fully advanced,	It shall be as if there were no children, the widow half by the custom, the other half to be distributed according to the statute.
A widow and representatives of a child (lineal descendants,)	Of the dead-man's part, by the statute, the wife one-third, the representatives two-thirds.

Variation between the two Customs.

London.

The share of the children (or orphanage part) is not fully vested in them till the age of twenty-one, before which time they cannot dispose of it by testament. *Wilcocks* v. *Wilcocks*, 2 *Vern.* 558.

If a child dies under the age of twenty-one, whether sole or married, its share shall survive to the other children, *Pre. Ch.* 537.; but after that age it is free from orphanage custom, and in case of intestacy shall be subject to the statute of distributions. But a male at fourteen, and a female at twelve, may bequeath his or her distributive share. 2 *Bla. C.* 519.; but see *Pre. Ch.* 537.

The tuition and custody of orphan children are committed to the lord mayor and aldermen.

York.

The share of the child or orphanage part) is fully vested in him on the intestate's death, as also the distributive share; and if a child dies under the age of twenty-one, without will, its share will be subject to the statute of distribution. *Pickering* v. *Stamford*, 3 *Ves.* 338.

A male child at fourteen, and a female at twelve, may dispose thereof by will. S.C.

The heir at law who inherits any lands, either in fee or in tail, general or special, although the same be ever so small, is excluded from any filial portion or reasonable part by the custom. So also is the heir in reversion. *Constable* v. *Constable*, 2 *Vern.* 375. *Errington* v. *Werg*, *Ridgw. Ca.* t. *Hardw.* 195.

Note. — The bar to the heir only extends to the custom, not to the statute.

London.

So that a freeman of London cannot devise the disposition of the body of his child. See 1 *P. Wms.* 710. *Frederick* v. *Frederick.*

The advancement must be of money or other personal estate; therefore the settlement of a real estate is no advancement, and need not be brought into hotch-pot. Although the conveyance shall express it to be in bar, yet he shall take with the rest.

The heir at law of a freeman is not precluded from taking a share of the father's personals.

York.

It *seems* also that the custom of York attaches only to a man while he is an inhabitant or householder within the province. *Pickering* v. *Stamford*, E. 1797, 3 *Ves.* 338. *Cholmley* v. *Cholmley*, 2 *Vern.* 49. 82., and see this vol. 470, 471. See also *Somerville* v. *Somerville*, (H. 1800.) 5 *Ves.* 790.

V. *Of the custom within the principality of* Wales.

By the 27 *H.* 8. *c.* 26. whereby lands and other hereditaments within the principality and dominion of Wales, were made to be inheritable after the manner of the English tenure, it is provided nevertheless, that lands, tenements, and hereditaments, lying within the said principality and dominion, which have been used time out of mind by the laudable customs of the country, to be departed and departable amongst issues and heirs male, shall so [478] continue and be used, in like form, fashion, and condition, as if this act had never been made.

And this is to be understood, as it seemeth, of the lands in those parts of Wales, where the conqueror never came.

But by the 34 & 35 *H.* 8. *c.* 26. All lands, tenements, and hereditaments, within the dominion of Wales, shall be taken, used, and holden, at English tenure, to all intents, according to the common laws of England; and shall not be partable among heirs male after the custom of gavelkind, as heretofore in divers parts of Wales hath been used and accustomed. (In like manner as gavelkind lands in Kent had been disgavelled by the statute of the 31 *H.* 8. *c.* 3., and a private statute made in the 2 & 3 *Ed.* 6.)

And by the 7 & 8 *W. c.* 38. it is enacted as followeth: Whereas in several counties and places within the principality of Wales and marches thereof, the widows and younger children of persons dying inhabitants therein, have often claimed and pretended to be entitled to a part of the goods and chattels of their late husbands or fathers, called their *reasonable part*, by virtue of a custom or other usage, notwithstanding any disposi-

tion of the same by their husbands' and fathers' last wills and testaments, or by deed in their lifetime, and notwithstanding a competent jointure made for the livelihood of the said widows, whereby great troubles, disputes, and expences concerning such custom have been occasioned; for remedy thereof, it is enacted, that it shall be lawful for any person inhabiting or residing, or who shall have any goods or chattels within the principality of Wales, or the marches thereof, by their last wills and testaments to give, bequeath, and dispose of all and singular their goods, chattels, debts, and other personal estate to their executors, or to such other persons as they shall think fit, in as large and ample manner as by the laws and statutes of this realm any person may give and dispose of the same within any other part of the province of Canterbury or elsewhere; and that the widows, children, and other the kindred of such testator, shall be barred to claim or demand any part of the goods, chattels, or other personal estate of such testator, in any other manner than as by the said last wills and testaments is limited and appointed; any law, statute, custom, or usage to the contrary notwithstanding. § 1.

[We may learn in general from the 7 & 8 *W.* 3. *c.* 38. that the doctrine of the *pars rationabilis* extends to intestates' effects within that principality; but the books contain no farther information on the subject. *Toller on Executors*, 403. *Off. Ex.* 97. *in notis, ibid. Suppl.* 72.]

[III. *Concerning the stamp duties chargeable on probates of wills, letters of administration, legacies, and on the distributive shares of an intestate's estate.*

The stamp duties chargeable 55 *Geo.* 3. *c.* 184. *Schedule, Part the Third*, on legacies and distributive shares of an intestate's estate are placed *ante*, 269 *b.* to 269 *d.* (4)]

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(4) *Points as to payment of legacy duty.*] The legacy duty is a charge upon the legacy, and not on the estate. When the legacy is given free of duty, it is an increase of the legacy, and ought therefore to be paid out of the same fund. *Waring* v. *Ward*, 5 *Ves.* 670; and see 6 *Ves.* 520. Where testator bequeathed legacies "without deduction" at the end of six months, and by certain calculations made by him there appeared adequate funds, the court held, that the legacies should be paid without deduction of the legacy duty. *Barksdale* v. *Gilliat*, 1 *Swanst. Ch. Rep.* 562. So where a legacy of 4000*l.*, the legacy duty to be paid out of the residue, was revoked, and 6000*l.* given on the same trusts, this is not a revocation, but a substitution in each instance, and the 6000*l.* was held exempt from legacy duty. *Cooper* v. *Day*, 3 *Meriv. Rep.* 154. See *Leacock* v. *Maynard*, 3 *Bro. C.* 233. *Crowder* v. *Clowes*, 2 *Ves. jun.* 449. S.P. The legacy duty on residue is to be paid on the aggregate amount of the residue of the testator's property at the time of the executor's delivering into the

VIII. *Account.*

1. IT is for the most part every where within this realm observed, that the executors promise to the ordinary by their oath, to make a true and perfect account, whensoever they shall be thereunto called by the said ordinary. *Swin.* 466, 467. **Executor's oath to account.**

2. By the statute of the 22 & 23 *C.* 2. *c.* 10. the administrator shall give bond to make or cause to be made a true and just account of his administration, at a day in such bond to be expressed; and all the residue of the goods, chattels, and credits, which shall be found and remaining upon the said administrator's **Administrator's bond to account.**

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stamp-office the note of what he intends to retain as residuary legatee. *Atto. Gen.* v. *Cavendish, T.* 1810, *Wightw. Rep.* 82. An estate devised to trustees to be sold, and the produce to be deemed part of the residue, or to go in aid, *if necessary,* of the residue in discharging of money legacies, was held liable to legacy duty, though the residuary legatee took the property *in statu quo,* and the trustees did not convert it into money by sale; for in equity the subject of such a bequest would go after the legatee's death to his personal representatives. *Atto. Gen.* v. *Holford, E.* 1815. 1 *Pri. R.* 426. As to legacy duty chargeable on trusts to pay interest during life, see *Atto. Gen.* v. *Lady Manners,* 1 *Pri. R.* 411. *Hill* v. *Atkinson,* 2 *Meriv.* 45. 3 *Pri. R.* 399. S. C. *Green* v. *Croft,* 2 *H. Bla.* 30.

A. by deed gave his leasehold and personal property to trustees, for the use of himself for life, and of several persons at his death. A. reserved a power of revocation, but never parted with the deed, or any of the property. By his will he confirmed his disposition in most respects. Held,—that the two instruments shall be construed together as testamentary instruments, and that the property passing under them will pass as legacies, and be subject to the legacy duty. *Atto. Gen.* v. *Jones, H.* 1817. 3 *Pri.* 368. *Wood. B. dissentiente.*

Legacy duty on sum bequeathed by will made abroad] Legacies bequeathed by a British subject in the East Indies to persons in England are liable to the duty, if the executor proves the will and pays the legacies here, notwithstanding the testator realized and possessed his property in India, resided and made his will there, and although the executors were in India at the time of their appointment, and the will was originally proved there. *Atto. Gen.* v. *Cockerell, T.* 1814. 1 *Pri. R.* 165. In *Atto. Gen.* v. *Beatson, T.* 1819. 7 *Pri. R.* 560, a testator had been domiciled in India, and on his death administration with the will annexed was taken out at Madras, and also from the Prerogative Court of Canterbury, by M. domiciled in Scotland; the Indian administrator, after payment of the Indian debts and legacies, remitted the surplus to the Scotch administrator, who being the testator's residuary legatee, applied it to his own use, without paying any legacy duty. On information by *Atto. Gen.* it was held, that M. was administrator in fact and in law, and the personal estate having been applied by him in England, the legacy duty on the whole property so applied was payable.

account, the same being first examined and allowed of by the ecclesiastical judge or judges for the time being, to deliver and
[486] pay unto such person or persons respectively as the said judge or judges by his or their decree or sentence shall limit and appoint.

Before whom the account shall be.

3. An account must be passed before the same judge, or his surrogate or successor, that grants the administration. By Dr. *Betlesworth*. *Floy*. 37.

Ordinary's power [at instance of legataries or creditors] to compel the executor to account.

4. Dr. *Swinburne* says, Albeit it seemeth, that the executor is not tied to make an account to the *legataries* or *creditors* extrajudicially; yet he supposeth that at the instance or promotion of such legataries and creditors, he may be compelled to render an account to the ordinary judicially. *Swin*. 466. (5)

But that an *executor* may exact an account of his co-executor extrajudicially, but not in judgment [that is, in the spiritual court]; but the ordinary may call them both, or either of them, to a judicial account. *Swin*. 466.

Ordinary's power to compel the administrator.

5. By the statute of the 31 *Ed*. 3. *st*. 1. *c*. 11. in case where a man dieth intestate, the ordinary shall depute the next and most lawful friends of the deceased person to administer his goods; which deputies shall have an action to demand and recover as executors the debts due to the person intestate in the king's court, for to administer and dispend for the soul of the dead; and shall answer also in the king's court to other to whom the said dead person was holden and bound, in the same manner as executors shall answer. And they shall be accountable to the ordinaries, as executors be in the case of testament, as well of the time past as the time to come.

And by the statute of the 22 & 23 *C*. 2. *c*. 10. the ordinaries shall and may proceed and call administrators to account, for and touching the goods of any person dying intestate; and upon hearing and due consideration thereof, order and make just and equal distribution of what remaineth clear (after all debts, funerals, and just expences of every sort first allowed and deducted); and the same distributions decree and settle, and compel such administrators to observe and pay the same by the due course of his majesty's ecclesiastical laws: saving to every one supposing him or themselves aggrieved, their right of appeal, as was always in such cases used.

But by the statute of the 1 *J*. 2. *c*. 17. it is provided, that no administrator shall be cited according to the said act of the 22 & 23 *C*. 2. *c*. 10. to render an account of the personal estate of his intestate (otherwise than by an inventory or inventories

(5) A debt on which the statute of limitations has attached, will enable the creditor to compel an administrator to account in the spiritual court. *Wainford* v. *Barker*, 1 *Raym*. 232.

thereof) unless it be at the instance or prosecution of some person in behalf of a minor, or having a demand out of such personal estate, as a creditor or next of kin, nor be compellable to account before any the ordinaries or judges by the said act [487] impowered and appointed to take the same, otherwise than as is aforesaid, any thing in the said act to the contrary notwithstanding. § 6.

Parties interested to have notice.

6. The creditors to whom the testator did owe any thing, and the legataries to whom the testator did bequeath any thing, and all others having interest, are to be cited to be present at the making of the account; otherwise the account made in their absence, and they never called, is not prejudicial unto them. *Swin.* 468.

And forasmuch as proofs made upon the account at the instance of some one or more persons having interest, do not bind others who are no parties to the suit; therefore, to prevent multiplicity of actions, it behoveth the executor or administrator, when he is cited by any one of the parties to render an account, to cite the next of kindred in special, and all others in general, having or pretending to have interest in the goods of the deceased, to be present if they think fit at the rendering and passing of the account. And then, upon their appearance, or contempt in not appearing, the judge will proceed to give sentence, and the account thus determined will be final. And this is expedient to be done, whether at the instance of any party or not; because the witnesses otherwise might be dead before calling for the account; and hereby the executors or administrators of the accountant are freed from giving any further account, which they might not be so well able to do, because they are not supposed to have been privy to the receipts and disbursements of their testator or intestate. 1 *Ought.* 354, 5, 6.

Manner of passing the account.

7. If any person having interest (as, for instance, the son of the deceased, a legatary, creditor, or the like) shall call the executor or administrator to exhibit a true, full, and perfect inventory of the goods of the deceased which have come to his hands, and to give an account of his administration thereof; he who is called in such case, is bound personally to exhibit such inventory and account, and (if the adverse party demand it) to take a corporal oath of the truth thereof; notwithstanding that at another time, perhaps, an inventory hath been exhibited *ex officio mero* of the judge, and in the absence of the party, and an account given upon oath. *Id.* 345, 6.

And this inventory is not to be exhibited under protestation [488] (as when an inventory is exhibited in common form, and not at the instance of the party), but absolutely and directly, for a full, true, and perfect inventory of all and every the goods of the deceased, which have come to the said accountant's hands since

the death of the deceased. And if he shall exhibit a false or imperfect inventory or account upon his said oath, he shall be guilty of perjury. 1 *Ought.* 346.

And the adverse party shall be at liberty to disprove or object against such inventory and account. *Id.* 347.

And he shall make due proof of every payment; that is to say, of lesser sums by his oath, and of greater sums by other proofs, such as the ordinary shall allow. *Swin.* 407.

Particularly, for sums under 40*s.* his own general oath as aforesaid shall be allowed as sufficient; provided that there shall appear no falsehood, or fraudulent division of sums; for sometimes accountants (knowing that all such small sums will be allowed to them upon their said oath) will divide greater sums into less: but if there appear no fraud, such small sums shall be allowed to them as aforesaid, to avoid expences in proving the same, and because it is presumed that the accountant will not forswear himself for obtaining the allowance of such little matters. 1 *Ought.* 347, 8.

But after the death of the executors or administrators, such lesser sums as aforesaid shall not be allowed upon the oath of their executors or administrators; for this can only be done on the oath of those who laid out the money. *Id.* 347.

Expences to be allowed.

8. The executor or administrator shall be allowed all reasonable expences, as well in law-suits, as for other honest purposes; and this reasonableness of expences to be such, as that he may receive thereby neither profit nor loss. *Lind.* 178.

And therefore he shall be allowed his expences in secular courts over and above such costs as were allowed there. *Floy.* 37.

Money lost.

9. Where an executor puts out money upon a real security, which at that time there was no reason to object to, and afterwards such security proves bad; he shall not be accountable for the loss. 1 *P. Will.* 141.

So if the executor pay the assets into the hands of a banker his co-executor, whom the testator used to intrust with his [489] money, after which the banker fails, the executor shall not be chargeable with the loss. 1 *P. Will.* 243.

Rowth v. *Howell.* In this case the testator directed his executors, with all convenient speed, to pay his debts, and lay out the residue of his property in mortgages. They entered into a treaty for a mortgage, which was delayed by difficulties as to the title. In the mean time, the testator's banker sold some negotiable securities deposited with him by the testator, and afterwards became bankrupt. Executors were held not to be answerable. 3 *Ves.* 365. (6)

(6) See *Knight* v. *Lord Plymouth*, 3 *Atk.* 480. 1 *Dick.* 120. S. C.

10. After due examination of the account as aforesaid, the ordinary finding the same to be true and perfect, may pronounce for the validity thereof; and the executor or administrator ought to be acquitted and discharged from further molestation and suits, neither ought they to be called by the ordinary to any farther account. *Swin.* 469. Discharge.

And by the statute of the 1 *Ed.* 6. *c.* 2. All acquittances of and upon accounts made by the executors, administrators, or collectors of goods of any dead person, shall be made in the name and with the style of the king, as it is in writs original or judicial at the common law; and the test thereof shall be in the name of the archbishop or bishop, or other having ecclesiastical jurisdiction.

11. A party praying an account, having an interest, is not to be condemned in costs; unless he object thereto, and fails in his proof. *Floy.* 38. Costs.

12. *M.* 35 *C.* 2. *Brown* and the archbishop of *Canterbury* against *Willis.* An action of debt was brought upon a bond conditioned for the payment of 300*l.* wherein one Brown was bound to the archbishop, that the administrator of T. S. should truly administer, and exhibit a true inventory of the intestate's estate, and give a just account of his administration. The defendant pleaded, that he had exhibited a true inventory, and given a just account. The plaintiff replied, that the intestate owed 200*l.* to E. G. by bond, and that his goods, to that value, came to the administrator's hands, and assigns breach in not paying that debt. And upon a demurrer to this application the plaintiff had judgment: but it was reversed in the exchequer chamber; because the breach was not within the meaning of the condition of that bond. *Lutw.* 882. Whether the administration bond shall be put in suit for debts not paid. (7)

H. 6 *An.* Archbishop of *Canterbury* and *Willis.* In debt upon a bond entered into by an administrator to the ordinary, upon taking letters of administration, the question was, Whether an administrator by virtue of this obligation was bound to go and give in his account in the spiritual court, without being cited? And by *Holt* chief justice, who delivered the opinion of the court: 1. It appears by the statute of *Ed.* 3. that an executor was compellable to account before the ordinary, and so was an administrator; but that the ordinary was to take the account as given in, and could not oblige them to prove the items of it, nor swear to the truth of them. So it was if a creditor sued in the ecclesiastical court; for he had a proper remedy at common law. But if a legatee had sued for an account in the ecclesiastical court, the defendant before the statute was compellable to prove the whole account; for the legatee had no other remedy, and [490]

(7) *Vide supra, Administration,* 22.

the ecclesiastical court, which had a jurisdiction of legacies, could not otherwise do right: yet in such a case, if the executor would pay him, he could not sue farther; for he had right done him, and the executor was not liable, but of necessity that right might be done. 2. A person intitled to distribution on the 22 *C.* 2. is in consequence intitled to sue for an account as a legatee was; for the next of kin is a legatee by the statute, and as a statute legatee shall have the same remedy as the other legatee might before the statute. The condition of an arbitration bond was, to account when required: therefore he was not to account before he was legally cited, which could not be *ex officio;* and therefore the statute of *J.* 2., whereby the ordinary is prohibited from citing him in *ex officio,* had really no effect at all, for the law was so before. But since the statute of *C.* 2. the condition of administration bonds being, that he account at a day certain, he must account accordingly at his peril, and that without citation or suit, and this account must be in court: and if he comes at the day, and no court is held, he shall be excused; for he may plead he was there ready, and no court held. But then this account is not examinable, unless a party interested comes in and controverts it. And whereas by the words of the condition he is to administer well and truly, that shall be construed in bringing in his account, and not in paying the debts of the intestate; and therefore the creditor shall not take an assignment of the bond and sue it, and assign for breach the non-payment of a debt to him, or a *devastavit* committed by the administrator: for that would be endless, and the bond doth not extend to that. 2 *Salk.* 315, 316. (*y*)

(*y*) The ordinary, after an administrator has exhibited an inventory, cannot compel him to account, except *ad instantiam partis.* But the commissary or other obligee of the administration bond may even without citation sue the administrator on the bond at law, and assign for breach that he did not deliver a true and perfect inventory; and if a creditor by indemnifying the commissary procure an assignment of the bond, and sue the administrator or his sureties on the like breach, and obtain a verdict, the penalty of the bond shall stand as a security for his debt and costs. *Grierside* v. *Benson,* 1 *Atk.* 248. S. P. *Bishop of Canterbury* v. *Hawse, Cowp.* 140.; in which case lord *Mansfield* expresses a strong opinion, that the ordinary *ex debito justitiæ* ought to permit a creditor, as well as the next of kin, to put the bond in suit, he being equally interested (as far as his debt reaches) in the administrators delivering in a true inventory of the effects. That a bond given by the servant of a company trading abroad to collect the effects of persons dying in their settlements is good in law, see 6 *T. Rep:* 588. and *supra, Administration, in fine.*

Form of an inventory.

A true and perfect inventory of all the goods, chattels, and personal estate of A. B. late of C. in the county of ——— and diocese of ——— yeoman, deceased, made by us whose names are hereunto subscribed, the ——— day of ——— in the year of our Lord ———

	£	s.	d.
His purse and apparel - - - -	15	0	0
Horses and furniture - - - - - -	20	0	0
Horned cattle - - - - -	27	0	0
Sheep - - - - - - - -	20	0	0
Swine - - - - - -	0	13	0
Poultry - - - - - - - - -	0	2	4
Plate and other household goods - - -	18	0	0
One lease of, &c. - - - - -	30	0	0
Rent in arrear - - - - - - - -	25	0	0
Corn growing at the time of his death -	12	0	0
Hay and corn - - - - - - - -	10	0	0
Ploughs and other implements of husbandry -	6	10	0
Debts - - - - - -	100	0	0
Total	284	6	4
Other debts supposed to be desperate - -	25	2	6

Debts owing by the deceased, 250*l.*

Appraised by us, the day and year above written,

A. B.
C. D.

Form of a will of lands.

I A. B. of C —— in the county of ——— yeoman, do make [492] this my last will: First, I give and devise unto C.D. of —— all and every my messuages, lands, tenements, and hereditaments, with the appurtenances, whereof I am seised in fee, situate, lying, and being in ——— in the county of ——— and now or late in the several tenures or occupations of ——— and ——— or one of them, their or one of their assigns, lessees, or under tenants: To have and to hold all and every the said messuages, lands, tenements, and hereditaments, with the appurtenances, to him the said C. D. his heirs and assigns for ever.

Also, I give and devise to my son G. B. all that my freehold land lying in a field called ——— field, near unto ———: To

hold unto the said I. for term of his life, and after his decease to my grand-daughter E. B. her heirs and assigns for ever.

Also, I give and devise unto I. K. of ——— all my copyhold messuages, lands, tenements, and hereditaments (and which I have surrendered to the use of my will) situate, lying, and being at ——— and which now are or lately were in the several tenures or occupations of —— and —— or one of them, their or one of their assigns, lessees, or under tenants: To have and to hold to the said I. K. and to the heirs of his body lawfully begotten; and for default of such heirs, then to the right heirs of me the said A. B. for ever.

In witness whereof, I have hereunto set my hand and seal, the ——— day of ——— in the year of our Lord ——

A. B.

Signed, declared, and published, as and for his last will and testament, in the presence of us who subscribed our names as witnesses in the testator's presence, and at his request,

C. D.
F. G.
H. J.

Of goods.

In the name of God, amen, I A. B. of ——— in the county of ——— yeoman, being mindful of my mortality, do this —— day of —— in the year of our Lord —— make and publish this my last will and testament in manner following: First, I desire to be decently and privately buried in the church-yard belonging to the parish in which I shall happen to die, without any
[493] funeral pomp, and with as little expence as may be; and I give and bequeath unto the poor of the same parish the sum of —— to be distributed in such proportions and manner as my executrix herein-after named shall think fit.

Also, I give and bequeath unto my eldest son J. B. the sum of ———

I give and bequeath unto my second son W. B. the sum of ———

Also, I give and bequeath unto my daughter M. B. the sum of ———

To be paid unto them respectively so soon as one year after my decease shall be expired.

Also, I do forgive unto L. M. the sum of ——— out of the principal sum of ——— which he owes to me upon bond.

Also, I give to my grand-daughters A. and B. children of my daughter C. the sum of ——— a-piece, to be paid to them respectively at their respective ages of twenty-one years, or days of marriage, which shall first happen; the same to be put out to interest at the discretion of my executrix, and the interest accruing thereof to be applied to their education and maintenance respectively, until their said respective ages or marriage. And in case either of them shall die before the age of twenty-one years or marriage, then I give the share of her so dying unto the survivor of them; and if both of my said grand-daughters shall happen to die before the attaining the age of twenty-one years or marriage, then I give and bequeath the whole of the said several sums unto my daughter D. if she shall be then living.

Also, I give to my wife E. B. during her life, the use of all my plate and household goods, bedsteads, bedding and other furniture; and after her decease to remain to my son J. B.

All the rest and residue of my personal estate whatsoever and wheresoever, and of what nature, kind, and quality soever the same may be, and not herein before given and disposed of (after payment of my debts, legacies, and funeral expences), I do give and bequeath unto my wife E. B., her executors, administrators, and assigns, to and for her and their own use and benefit absolutely; and I do hereby constitute and appoint my said wife E. B. sole executrix of this my last will and testament.

In witness whereof, I have hereunto set my hand and seal, the day and year first above-written.

A. B.

Signed, declared, and published, as and for his last will and testament, in the presence of us,

C. D.
E. F.

Of lands and goods. [494]

In the name of God, amen. I A. B. of ——— esquire, do make and declare this my last will and testament in manner following:

First, I give and devise to my younger son B. B. all that my whole freehold messuage and tenement, situate, lying, and being at ——— to have and to hold to my said son B. B. his heirs and assigns for ever.

Also, I give and devise all that my messuage and tenement, with the appurtenances, situate, lying, and being at —— unto my daughter C. B.; to have and to hold to my said daughter

C. B. and her assigns, for and during the term of her natural life, without impeachment of waste; and from and immediately after her decease, I give and devise the same unto my said son B. B. and the heirs of his body lawfully to be begotten; and for default of such heirs, then to my own right heirs for ever.

Also, I give and devise unto my grandson E. G. all that my messuage and tenement, with the appurtenances, situate, lying, and being at ——, commonly called —— tenement; to have and to hold (subject nevertheless to, and charged and chargeable with the annuity, yearly rent, or sum of —— herein after mentioned) to him the said E. G., his heirs and assigns for ever: and I do hereby give, devise, and bequeath unto my wife E. B. and her assigns, for and during the term of her natural life, one annuity or clear yearly rent or sum of 60*l.* of lawful money of Great Britain, free of all taxes and other deductions, parliamentary or otherwise, to be issuing and payable out of the said messuage and tenement, and to be paid and payable by equal half yearly payments, at the feast of the annunciation of the blessed Virgin Mary, and of St. Michael the archangel; the first payment thereof to be on such of the same feasts as shall first and next happen after my decease; and I do hereby charge and subject the said messuage and tenement to and with the payment of the said annuity, yearly rent, or sum of 60*l.* accordingly: and my will is, that in case the said annuity, or any part thereof, shall be behind or unpaid by the space of twenty days next after either of the aforesaid feasts, whereon the same is herein before directed to be paid as aforesaid (being lawfully demanded); that then and so often it shall and may be lawful for my said wife and her assigns, to enter upon the said premises charged with the said annuity as aforesaid, and distrain for the same, or for so much thereof as shall be so in arrear; and the distress and distresses
[495] then and there found to detain and keep, until she shall be fully paid and satisfied all such arrearages, with costs and charges in and about the making and keeping thereof. And in case the said annuity, or any part thereof, shall be behind and unpaid by the space of forty days next after any of the said days of payment, whereon the same ought to be paid as aforesaid; that then and so often it shall and may be lawful for my said wife and her assigns, into all and singular the premises, charged with the said annuity as aforesaid, to enter; and the rents, issues, and profits thereof to receive and take, until she be therewith and thereby, or by the person or persons who shall be then entitled to the immediate possession of the premises, paid and satisfied the same and every part thereof; and all the arrears thereof incurred before, and that shall incur during such time as she shall receive the rents, issues, and profit thereof, or be entitled to receive same by virtue of such entry to be made as aforesaid, together with her

costs, damages, and expences laid out and sustained by reason of the non-payment thereof, or any part thereof.

Also, I give and devise unto D. F. all that my messuage and tenement, with the appurtenances, which I hold by or under a lease from ———, and all my estate, right, title, term, and interest of and in the same premises, with the appurtenances; to have and to hold to him the said D. F., his executors, administrators, and assigns, to and for his and their own use and benefit.

Also, I will and ordain, that the executor of this my last will and testament, or his executor or executors, for and towards the performance of my said testament, shall, with all convenient speed after my decease, bargain, sell, and alien in fee simple, all those my lands called ———; for the doing, executing, and perfect finishing whereof, I do by these presents give to my said executor, and his executor or executors, full power and authority to grant, alien, bargain, sell, convey, and assure all the same lands called ——— to any person or persons, and their heirs for ever in fee simple, by all and every such lawful ways and means in the law, as to my said executor or his executor or executors, or to his or their counsel learned in the law, shall seem fit or necessary.

And I do hereby appoint my trusty friend E. E. executor of this my last will and testament, and do give unto him the sum of ——— in consideration of the pains and trouble he will have in the execution of this my will.

Also, I give unto P. Q. of ——— the sum of one hundred pounds.

Also, I give unto R. S. of ——— the like sum of one hundred pounds.

Also, for the better education of my children A. B. and C., [496]
I do give and dispose of my tuition and custody of them, and every of them, unto my wife E. G., for such time as they or any of them respectively continue unmarried, and under the age of one-and-twenty years, and my said wife remains my widow; but if my said wife shall die or marry, during the single life and nonage of any of my said children, then I give the custody and tuition of such of my children, so being unmarried and under the age of one-and-twenty years at the marriage or death of my wife, unto my said executor E. E.

Also, I do hereby authorize, impower, and direct my said executor, and his executor or executors, from and after my decease, until the aforesaid E. G. shall attain his age of one-and-twenty years, to manage and improve the estate and fortune of him the said E. G. by me hereby given him, for his use and benefit; and to lease all or any part of his freehold, copyhold, or leasehold estates, and to lend and place out on security or securities at

interest, or otherwise improve according to his or their discretion or discretions, all or any part of the monies belonging to or arising from the said estates and fortune of the said E. G., and to pay unto and account with him the said E. G. for all such rents, interests, produce, and improvements, as shall arise from, or be made of, and produced by the said estates, monies, and fortune hereby given and devised to him, when he shall attain his age of twenty-one years.

And my will is, and I do hereby expressly declare, that my said executor, his executor or executors, shall not be charged or chargeable with or accountable for more of the aforesaid monies and estates than he or they shall actually receive, or shall come to his or their respective hands by virtue of this my will, nor with or for any loss which shall happen of the said monies or estate hereby by me given to the said E. G., or of any of the aforesaid sums to me bequeathed, or of any part of my personal estates; so as such loss happen without his or their wilful default and neglect.

And also that it shall and may be lawful for him my said executor, and his executor or executors, in the first place, out of the said premises respectively, and out of the residue of my personal estate, to deduct and reimburse him and themselves respectively, all such loss, costs, charges, and expences, as he or they shall sustain, expend, or be put unto for or by reason of the performance of this my will, or the management or execution thereof respectively, or any other thing in anywise relating thereunto.

And finally; all the rest, residue, and remainder of all my estate and effects, real and personal, whatsoever and wheresoever, not herein-before otherwise effectually disposed of (after
[497] payment of my debts, legacies, and funeral expences, and other charges and deductions as aforesaid), I do give, devise, and bequeath unto my eldest son A. B.

In witness whereof, I have hereunto set my hand and seal, the ——— day of ——— in the year of our Lord ———

A. B.

Signed, declared, and published, as and for his last will and testament, in the presence of us who subscribed our names as witnesses in the testator's presence, and at his request,

C. D.
E. F.
G. H.

Codicil.

Whereas I A. B. of —— have made and duly executed my last will and testament in writing, bearing date ——, now I do hereby declare this present writing to be as a codicil to my said will, and direct the same to be annexed thereto, and taken as part thereof: And I do hereby give and bequeath to C. D. of —— the sum of ——. And whereas by my said will I did give and bequeath unto E. F. the sum of ——, now I do hereby revoke the said legacy, and do give unto him the said E. F. the sum of —— and no more. In witness whereof I the said A. B. have to this codicil set my hand and seal the —— day of —— in the year of ——

A. B.

Signed, declared, and published, as and for a codicil, to be annexed to his last will and testament, and to be taken as part thereof, in the presence of

C. D.
E. F.

Nuncupative will.

The last will and testament of A. B. of —— in the county of —— deceased, declared by him by word of mouth, the —— day of ——, in the presence of us who have hereunto subscribed our names as witnesses thereof. My will is, that [*here insert the very words*]. In witness whereof we have hereunto set our hands the —— day of —— in the year —— [498]

C. D.
E. F.
G. H.

Precedents of long intails, and remainders, and contingencies, and limitations, are here purposely omitted; not only because they are above the author's skill (for this he could have supplied from books of acknowledged reputation), but also and chiefly because they ought to be drawn *pro re nata*, and by the advice of counsel learned in the law. For although the law favours wills, yet it is when wills favour the law. The common law abhors a perpetuity; and the reason is, because if one person might indefeasibly limit his estate, so also might another, and consequently by the same rule the present generation might dispose of all the lands in the kingdom for ever; which would

be full of intolerable inconvenience: and therefore the law interferes, and herein checks the vanity and pride of man. And whoever shall examine the reports of cases adjudged in the high court of chancery, will observe that scarcely any thing creates to the courts of equity so much trouble as long entails, vainly imagined to perpetuate names and families; which although generally drawn by the ablest advice, yet always meet with discouragement and contradiction. For they are struggles against the bent and inclination of the law: and we may add also, against the course of Providence; which from its effects and appearances, doth not seem to intend that any thing here should be perpetual.

[Witchcraft.

TO repeal several statutes against conjuration, enchantment, and witchcraft, and for punishing such persons as pretend to exercise or use any kind of sorcery, witchcraft, &c. 9 *G.* 2. *c.* 5.

The 1 *J.* 1. *c.* 12. shall be repealed, except as far as it repeals 5 *El.* *c.* 16. *id.* § 1. The 9 *M.* (*Sc.*) *Anent witchcraft*, is repealed. *Id.* § 2.

No prosecution shall lie against any person for witchcraft, sorcery, enchantment, or conjuration, or for charging another with such offence. *Id.* § 3.

Every person who shall pretend to use witchcraft, &c., or undertake to tell fortunes, or from skill in any occult or crafty science to discover where lost or stolen goods may be found, shall, when convicted on indictment or information in England, or on indictment or libel in Scotland, suffer imprisonment for one year, and once in every quarter thereof, in some market town, on the market day, stand on the pillory one hour, and shall, if the court think fit, be obliged to give sureties for his good behaviour. *Id.* § 4.

By 1 & 2 *G.* 4. *c.* 18. The Irish act of 28 *El.* *c.* 2. "Against witchcraft and sorcery" is repealed.]

Witnesses. See **Evidence.**

Woollen; burying in. See **Burial.**

ADDENDA.

Appeal.

Vol. I. 61. *note* (4), add,

AND under circumstances, an allegation in support of a will, which had been rejected in the court below, was admitted in the court of appeal. *Addams* v. *Kneebone*, 2 *Phill. R.* 124.

Bastard.

Vol. I. 118. *note* (7), after "8 *East.* 193." add,

The evidence of illegitimacy must be of a nature to exclude all doubt as to the non-sexual intercourse of the husband, but still it may be shewn by every species of legal evidence tending to the same conclusion. Whenever a husband and wife are proved to have been together at a time, when, in the order of nature, if sexual intercourse had taken place, he might have been the father of the child, the presumption is, that it did take place, and can only be negatived by disproving that fact by evidence of circumstances affording irresistible presumption that it could not have taken place, and not by mere evidence of circumstances affording a balance of probabilities against it. *Head* v. *Head*, 1 *Simeon & Stuart's Reports*, 159.

Burial.

Vol. I. 271., add at end of *note* (8),

Semble, A husband is not entitled to the expences of his wife's funeral out of her separate estate. *Gregory* v. *Lockyer*, 6 *Madd. Rep.* 90.

Church. (Church Rate.)

Vol. I. 386. *note* (10), add,

But the court of chancery is not ancillary thereto. *Anon. T.* 1752, 2 *Ves.* 451. See *Dunn* v. *Coates*, 2 *Atk.* 288.

Churchwardens.

Vol. I. 408. *note* (5), add,

The churchwardens and overseers of a township leased lands belonging to the poor to plaintiff for a term of years, with a covenant that plaintiff might take all manure from the poor-house, and use it on the demised premises; and plaintiff covenants to provide straw for the poor. This covenant for the manure, entered into by previous churchwardens, cannot bind their successors, who are not liable in trover for using the manure on their own land, and that though it arises from the straw supplied by plaintiff. *Sowden* v. *Elmsley*, 3 *Stark. C. N. P.* 29.

Vol. I. 415. *note* (*x*), add at end,

And 358. *note* (6). And in another action arising out of the same circumstances, by plaintiff against his co-churchwarden, for monies paid for repairs, nonjoinder of the vestrymen who signed the resolution for such repairs, was pleaded in abatement. But it was held, that as in signing they only acted as vestrymen without any intention of becoming separately liable, there could be no more reason for joining them than all the rest of the parishioners: and that the defendant having concurred with the plaintiff in giving orders for the work, was liable to plaintiff for a moiety of what the latter had paid. *Lanchester* v. *Tricker*, 1 *Bingh. R.* 201.

Courts.

Vol. II. 49. end of note (*h*), add,

The ecclesiastical court has no jurisdiction over *trusts;* and therefore, where a party sued as a trustee was arrested, under a decree of that court, by writ *de contumace capiendo*, the K. B. discharged him out of custody. *Ex parte Jenkins*, 1 *Bar. & Cress. R.* 655.

Curates.

Vol. II. 74., add at bottom,

This section only applies to a curate who holds under a spiritual rector or vicar: where, therefore, a party held a curacy and dwelling-house by virtue of an appointment as chaplain, and he had ceased to fill that office; held, that he might be ejected from the latter without the previous permission obtained from the bishop, and three months' notice required by the statute. *Goodtitle* v. *Lee*, 2 *D. & R.* 718.

Dilapidations.

Vol. II. 154. after third paragraph add,

If a parsonage or vicarage-house be destroyed by the incumbent's default, he is bound to rebuild it; but if it be burnt down without his fault, the ecclesiastical court will order one-fifth of the profits of the living to be set apart in order to rebuild it. *Sollers* v. *Lawrence*, *Willes R.* 413.

Dissenters.

Vol. II. 206. *note* (7), after "*id.* 386." add,

A publication stating Jesus Christ to be an impostor and a murderer in principle, and a fanatic, is a libel at common law; for christianity is a part of the law of the land. (See **Profaneness**, *note* (3).) *Semble*, That 53 *G.* 3. *c.* 160. does not alter the common law, but only removes the penalties imposed by 9 & 10 *W.* 3. *c.* 32. on persons denying the Trinity, and extends to them the benefits conferred on all other protestant dissenters by 1 *W.* & *M. c.* 18. § 1. *The King* v. *Waddington*, 1 *B.* & *Cr. R.* 26.

Gaols.

For providing clergymen to officiate in gaols and houses of correction within England. 13 *G.* 3. *c.* 58. 22 *G.* 3. *c.* 64. § 12. (Amended by 55 *G.* 3. *c.* 48., which is amended by 58 *G.* 3. *c.* 32.)

The quarter sessions in every county, riding, division, or place in England and Wales, may ascertain how many clergymen shall be deemed necessary to be employed in performing religious duties according to the church of England, in the several gaols within their respective jurisdictions, and what salaries, not exceeding 50*l.* yearly, (but see present amount of salary, 55 *G.* 3. *c.* 48. § 1. and 58 *G.* 3. *c.* 32. § 2.) shall be paid to them. 13 *G.* 3. *c.* 58. § 1.

The said quarter sessions may appoint a minister of the church of England, residing in or near the place where any house of correction shall be situate, to perform divine service there every Sunday, appointing such salary for his trouble as they shall think fit, not exceeding 20*l.* *per ann.*, to be paid by the treasurer of the county, riding, division, or place where such house is situate, out of the county rates, but subject to diminution by the justices. 22 *G.* 3. *c.* 64. § 12.

The treasurers of such counties, &c. receiving a certificate

signed by the chairman of the quarter sessions, of the number of such clergymen, and their respective salaries, shall pay the same out of the county, &c. rates, and be allowed them in their accounts. 13 *G.* 3. *c.* 58. § 2.

When the number of clergymen, and their salaries, have been so settled, the quarter sessions may appoint such number of clergymen; and if any of them die, or are considered unworthy to be continued in office, may appoint any other clergymen to officiate in their room. *Id.* § 3.

The quarter sessions in England and Wales, and the annual general session in the county palatine of Lancaster, may increase the salary of 50*l.* a year given by 13 *G.* 3. *c.* 58. to not exceeding 100*l.* *per annum.* 55 *G.* 3. *c.* 48. § 1.

All the provisions of 13 G. 3. *c.* 58. are applicable to houses of correction. *Id.* § 2. (See the present salary of clergymen officiating in houses of correction. 58 *G.* 3. *c.* 32. § 1.)

Every clergyman so employed, shall, in order to entitle himself to receive the salary, keep a journal in a book provided in the gaol or house of correction where he is employed, in which he shall enter his times of attendance there to perform his duty, with any observations which may occur to him in the execution thereof; which journal shall be regularly produced for the inspection of the quarter sessions, and signed by the chairman in proof of production. *Id.* § 3.

No clergyman so appointed to officiate in any gaol or house of correction shall so officiate till he has obtained a licence for the same from the bishop of the diocese, and only while the same remains in force; and the clerk of the peace shall, in one month after every such appointment, transmit a copy thereof to such bishop. 55 *G.* 3. *c.* 48. § 5.

The quarter sessions may respectively assign any larger salary than that given by 55 *G.* 3. *c.* 48. § 1. of 50*l.* *per annum*, but not exceeding 100*l.*, to clergymen officiating as chaplains in houses of correction. 58 *G.* 3. *c.* 32. § 1. And, if they think fit, may unite the offices of clergymen to gaols and houses of correction, by appointing one as a chaplain for both, with any salary not exceeding (20*l.*, 55 *G.* 3. *c.* 48. § 4. now) 150*l.* *per annum.* 58 G. 3. *c.* 32. § 2.

Marriage.

Vol. II. 476 *a.* *note* (8), add,

Lacon v. *Higgins*, 3 *Starkie's* C. N. P. 178. 1 *D.* & *R.* C. N. P. 38. S. C. On a plea of coverture to an action for goods sold, it appeared that the British parties, being catholics, had

been married by an English protestant clergyman, according to the English rites at Versailles, whither they had gone from Paris. The invalidity of the marriage by French law, as the *lex loci*, was held by *Abbott* C. J. to make it illegal in England, as a defence to the action; and *Dalrymple* v. *Dalrymple*, 2 *Hagg*. 54., was cited. To prove the French law, the French vice-consul here produced a book purporting to contain the code of France, and proved by oral testimony to contain the law of France. This book was admitted in evidence, as it purported to have been printed at the royal printing-office, which was stated by the witness to be authorised to print the laws of France by the government of that country; and the *The King* v. *Picton*, 30 *Howell's State Trials*, 514., was cited to this point. The articles of French law, which prescribe the forms essential to marriage, but which do not annul it in fact for non-observance thereof, are, as it seems to be considered, as merely directory. But parol evidence was admitted to shew, that by that law a marriage in fact, (according to the canon law,) had without observing the previous forms prescribed by the code, would be considered by the French courts to be a mere nullity.

Alimony, 508. note. *Permanent Alimony*.

Where, after separation, the husband committed adultery, an addition was made to the allotment for permanent alimony, (which was the produce of the wife's own fortune, being all that was settled on her): and the sum allowed was half the annual value of the husband's residence, of which the wife had no participation. *Blaquiere* v. *Blaquiere*, 3 *Phill. R*. 258.

Proctor.

Vol. III. 212. at end of second line, add,

If any proctor of the arches court of Canterbury, or other ecclesiastical courts in England, or in the court of prerogative, or in the ecclesiastical courts of Armagh, Dublin, or others in Ireland, shall act as such, or suffer his name to be used in any suit, the prosecution or defence of which belongs to his office of a proctor, or in obtaining probates, letters of administration, or marriage licences, for benefit of any person, not being a proctor, or shall suffer such person to participate in the profits, and complaint is made to the court and proofs given, he shall be struck off the roll of proctor, and be disabled from acting as such, or suspended therefrom, at will of the court; except allowances to widows or children of deceased proctors, by their surviving partners, and except agreement between proctors and

articled clerks executed before the act, 53 *G.* 3. *c.* 127. § 8. *England*, 54 *G.* 3. *c.* 68. § 9. *Ireland.*

Every person acting as proctor in his own or another's name for fee, or with a view to participation of profit, without admission and enrolment, shall forfeit 50*l.* 53 *G.* 3. *c.* 127. § 9. *England*, 54 *G.* 3. *c.* 68. § 10. *Ireland.*

Nothing herein shall extend to any salary agreed to be paid by a proctor to a clerk, *bonâ fide* serving in his office at the time of passing this act, and having so served for seven years next preceding. 53 *G.* 3. *c.* 127. § 10. *England*, 54 *G.* 3. *c.* 68. § 11. *Ireland.*

Such penalties and plaintiff's full costs shall be recovered, to his majesty's use, in any of his majesty's courts at Westminster, or his four courts in Dublin, by action of debt, plaint, bill, or information: wherein no essoign, &c. and only one imparlance allowed. 53 *G.* 3. *c.* 127. § 11. *England*, 54 *G.* 3. *c.* 68. § 12. *Ireland.*

Limitation of action, &c. under these acts, is three calendar months, laying the venue in the city and county where the cause thereof arose: defendant may plead the general issue, giving this statute and special matter in evidence, and that the act was done under authority thereof: if it shall so appear, or if the action is brought in a wrong county, or after three months, the judge shall find for defendant; and on such verdict, or on nonsuit, or discontinuance by plaintiff, after defendant's appearance, or on judgment against plaintiff on demurrer, defendant shall have treble costs. 53 *G.* 3. *c.* 127. § 12. *England*, 54 *G.* 3. *c.* 68. § 13. *Ireland.* Nothing in 54 *G.* 3. *c.* 68. extends to any part of U. K. but Ireland. 54 *G.* 3. *c.* 68. § 14.

Register Book.

Vol. III. add at end,

In *Wihen* v. *Law*, 3 *Stark. C. N. P.* 63. Defendant, to prove his infancy at a particular time, produced the register of his christening, from which it appeared that he was christened in the year 1807; but the entry also stated that he was born in 1799. *Bayley* J. was of opinion, that the entry relating to the time of his birth was not evidence of the fact: it did not appear upon whose information the entry had been made; and the clergyman who made it had no authority to inquire concerning the time of birth, or to make any entry concerning it in the register. On motion for a new trial, on the ground that the entry was evidence to confirm the statement of the mother, who had been examined as a witness for defendant, the court refused the rule, saying, that the entry was not evidence to prove the age

of the party; it was nothing more than something told to the clergyman at the time of the christening, concerning which he had not power by law to make an entry in the register: he had neither the authority or the means of making an entry. If it had appeared that the entry had been made by the direction of the mother, it might perhaps, if required, have been read in evidence for the purpose of confirming her testimony; but even then it would have amounted to nothing more than a mere declaration by her as to the age of her son, made at a time when she had no motive to misrepresent his age.

The entry of the birth of a Dissenter's child in a register kept at Dr. Williams's library in Redcross Street, is not evidence. *Ex parte Taylor*, 1 *J. & W.* 483.

Residence.

Vol. III. 308 *b. note* (4), add at end,

Acts of non-feasance are within the scope and purview of 31 *Eliz. c.* 5. § 7.: therefore an action for penalties for non-residence can only be tried in the county where the benefice on which defendant ought to have resided was situated. *Whitehead* v. *Wynne*, 2 *Chitt. R.* 420.

Simony.

Vol. III. 366. *note*, after "*Ld. Sondes* v. *Fletcher*, 5 *B. & Ald.* 335." add,

For no bill lies to compel a party to resign in favour of another, pursuant to a covenant by him to that effect; as the court of chancery has no means of compelling the ordinary to accept the surrender, or to present to a benefice. *Newdigate* v. *Helps*, 6 *Madd. Rep.* 133.

Tithes.

Vol. III. 409. *a.*, at end of note (7),

When several species of small tithes had been paid to the vicar, although not included in the endowment, which only enumerated certain articles, and no claim had ever been set up by the rector or other person; it was held that such endowment by legal construction extended to give the vicar all the tithes of the same nature as those of which a few were specified. *Manby* v. *Lodge*, 9 *Pri. R.* 244. See *Manby* v. *Curtis*, 2 *id.* 284. *Kennicot* v. *Watson*, 9 *Pri. R.* 250. But *semble*, The vicar cannot support

his claim to any other tithes than those specified in his endowment, without shewing actual perception of them. *Manby* v. *Taylor*, *ib.* 240. 249. The rector standing by and allowing such a payment to the vicar must be bound by his own neglect. 9 *Pri. R.* 245. When the vicar was found to have the tithe of agistment in three out of five townships, and the impropriator claimed under a grant only of corn and grain, and no evidence of perception by him shewn: held, there must be evidence how the latter acquired it before the court would pronounce the vicar to have lost a right which at one time he certainly possessed; and an account of agistment tithe was therefore decreed to him. *Williamson* v. *Hutton*, 8 *Pri. R.* 192.

Vol. III. 441. *note* (3), line 5., after "4 *Pri. R.* 372." add,

Thus, although there may be a parol contract for retainer of tithes, it is merely personal, and ceases on the change of occupier or incumbent: held, therefore, that a subsequent occupier could not avail himself of a parol agreement made with his predecessor; but such agreement is *primâ facie* evidence of the value. *Paynton* v. *Kirby*, 2 *Ch. R.* 405.

Vol. III. 488. line 14.

And this custom, when laid for a division of a hundred, which proved to be a modern district, was held bad: the district ought to be as antient as the custom, and such custom cannot be, except for an antient district not less than a county or hundred. *Page* v. *Wilson*, 2 *J. & W.* 524.; and see *Walton* v. *Tryon*, 2 *Gwill.* 827. *Hicks* v. *Woodson*, 4 *Mod.* 336.

Vol. III. 518. line 5., after (8),

In *Manby* v. *Lodge*, 9 *Pri. R.* 246., an account of tithes of the annual profits of an antient mill, with recent additions and improvements, was granted; but allowances were made for rent, repairs, wages, and other outgoings.

Wills. Form and Manner.

Vol. IV. 107. *note* (*m*), add,

Though one part of a will not duly attested according to the statute of frauds, in order to pass real estate, may have effect as to the personalty; the principle on which instruments not duly attested according to that act are rejected, does not even raise a case of *election*. *Ex parte Earl of Ilchester*, 7 *Ves.* 375.

Wills. Probate.

Vol. IV. 232. after 4 *Inst.* 335., add,

Where a canal was situate in both provinces, the court held that probate of a will disposing of shares in the province of Canterbury was sufficient, and that probate in each was unnecessary. *Smith* v. *Stafford*, 2 *Wils. Ch. R.* 166.

Probate, how far Evidence.

Vol. IV. 262. *note* (8), add,

In an action against an executor for money had and received after notice to produce the probate, it was held that the original will produced by the officer of the ecclesiastical court, bearing the seal of that court, and indorsed as the instrument on which the probate was granted, and the value of the effects sworn to, was admissible as secondary evidence. *Quære*, — if it would be good as original evidence? *Gorton* v. *Dyson*, 1 *Brod. & Bing. Rep.* 219.

Vol. IV. 249. *note* (3), line 8. from bottom, add,

However, in *Wood* v. *Stone*, 8 *Pri. R.* 613. *cor. Richards* C. B., proof of the attestation of one of the witnesses only, without proving by positive testimony that the others were dead or living abroad, was held insufficient; but leave was given to exhibit an interrogatory for further proof of the will. *Wood* v. *Stone*, 8 *Pri. R.* 613.

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IN THE

ORIGINAL TEXT AND *NOTES* TO THE *SEVEN FIRST EDITIONS.*

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ERRATA.

VOL. II.

Page *55 n.* at end of 1st break add ' see now *57 Geo.* 3. *c.* 99. *s.* 52. *p.* 64.'
67 *d.* 3d paragraph *for* ' 36 *Geo.* 3. *c.* 38.' *read* ' *c.* 83.'
72 *n.* (2) add at end ' see now 57 *Geo.* 3. *c.* 99. *s.* 52. p. 64.'
136 *n. penult.* line *for* ' with' *read* ' without.'
153 *n.* (*h*) add ' *Sollers* v. *Lawrence,* Willes' R. 413. S. P.'
157 *n.* in margin *for* ' sequestration' *read* ' sequestrator.'
192 *a. n.* 9. end of 2d paragraph, *add* ' but see 52 *Geo.* 3. c. 155. *s.* 9.'
192 *a. n.* 9. 1st line of 2d paragraph for ' *does*' read ' *did.*'
2nd line add after ' 572' Till by 10 *Ann. c.* 2. *s.* 9. *ante* p. 189, 190, it was otherwise specially provided.
336. *tit.* Jews. *Charities* and *Naturalization,* at end of this page, are misprinted there as principal heads.
506 *a.* line 3 from bottom, after 9 *Mod.* 31. add ' See *Addenda* Burial.'

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84 *l.* 6. *for* ' 26 *Geo.* 8.' *read* ' 26 *Hen.* 8.'
93 *n.* 8. *l.* 15. for ' *argued*' read ' *arguendo.*'
308 *r.* Leases of non-residents: here were placed in the former editions, *Mills* v. *Etheridge, Bunb. R.* 210. *Quilter* v. *Lowndes, Bunb.* 211. *Atkinson and Prodgers* v. *Peasley,* (which last case see ii. 393, *n.* 7.) which seem superseded by the operation of 57 *Geo.* 3. *c.* 99. *s.* 1.